80-361

No. _____

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IN THE

Supreme Court of the United States

TERM, 1980

EDWIN S. MALMED, STANLEY L. KUBACKI, GREGORY G. LAGAKOS, JOSEPH T. MURPHY, and JAMES L. STERN,

Petitioners,

vs.

RICHARD L. THORNBURGH, Individually and as Governor of Pennsylvania, ETHEL D. ALLEN, Individually and as Secretary of the Commonwealth of Pennsylvania, ROBERT E. CASEY, Individually and as Treasurer of the Commonwealth of Pennsylvania, and ALEXANDER F. BARBIERI, Individually and as Pennsylvania Court Administrator,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal constitutional guarantee of equal protection is violated by a system of state laws which, while ostensibly mandating the retirement of judges at age 70, actually permits all judges to continue to serve beyond 70, performing work which, because of a shortage of judges, is essential to the operation of the judicial system but pays such judges substantially less salary for the same work than judges under 70?

2. Whether the federal constitutional guarantee of due process is violated by a system of state laws which creates an irrebutable presumption that judges reaching the age of 70 become unfit to serve as judges where there are reasonable alternative means for determining fitness and where the system does not in fact involuntarily remove any judge from the bench at 70, but simply reduces him to an inferior pay status, while making full use of his judicial services?

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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1980

No.

EDWIN S. MALMED, STANLEY L. KUBACKI, GREGORY G. LAGAKOS, JOSEPH T. MURPHY, and JAMES L. STERN,

Petitioners

v.

RICHARD L. THORNBURGH, Individually and as Governor of Pennsylvania, ETHEL D. ALLEN, Individually and as Secretary of the Commonwealth of Pennsylvania, ROBERT E. CASEY, Individually and as Treasurer of the Commonwealth of Pennsylvania, and ALEXANDER F. BARBIERI, Individually and as Pennsylvania Court Administrator,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners above named respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 13, 1980, petitioners' petition for reargument having been denied on June 10, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Eastern District of Pennsylvania, reported at 478 F. Supp. 998, additionally appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 13, 1980. A timely petition for rehearing before the Court en banc was denied on June 10, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

United States Constitution, amend. XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsylvania Constitution, Article V, §16(b):

Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years. Former and retired justices, judges and justices of the peace shall receive, such compensation as shall be provided by law. No compensation shall be paid to any justice, judge or justice of the peace who is suspended or removed from office under section eighteen of this article or under article six.

Pennsylvania Constitution, Article V, §16(c):

A former or retired justice or judge may, with his consent, be assigned by the Supreme Court to temporary judicial service as may be prescribed by rule of the Supreme Court.

Pennsylvania Constitution, Article V, §18
(Reproduced at p. 68a of Appendix hereto.)

42 Pa.C.S.A. §3154(c), Senior Judges
(Reproduced at p. 70a of Appendix hereto.)

Act of August 31, 1966, P.L. 47 §§1 *et seq.*, 17 P.S. §§790-.101 *et seq.* Assignment of Former Judges
(Reproduced at p. 71a of Appendix hereto.)

Pennsylvania Rule of Judicial Administration 701. Assignment of Judges to Courts.
(Reproduced at p. 74a of Appendix hereto.)

STATEMENT OF THE CASE

This action was instituted by five judges of the Court of Common Pleas of Philadelphia County, against the Governor, Secretary of the Commonwealth, Treasurer, and Court Administrator of Pennsylvania seeking declaratory and equitable relief on the ground that Article V, Section 16(b) of the Pennsylvania Constitution, providing for the mandatory retirement of judges at age 70, and various statutes enacted pursuant thereto are unconstitutional in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. 1331(a) and 28 U.S.C. 1343(3), (4). The action was tried without a jury on April 17, 18 and 20, 1979, before the Honorable William Ditter, Jr. in the United States District Court for the Eastern District of Pennsylvania.

The evidence produced at trial consisted largely of a detailed 76 paragraph stipulation of facts entered into by the parties. Additionally, the plaintiff in this proceeding, and the petitioners, herein, produced testimony of the Honorable Edward J. Bradley, President Judge of the Court of Common Pleas of Philadelphia County, two medical experts in the field of aging, and several documentary exhibits. The defendants (respondents) produced only the Reference Manual to the Pennsylvania Constitutional Convention of 1967-68. On the basis of such evidence, the trial court entered extensive findings of fact which established, with respect to this case, inter alia, the following facts:

Prior to 1968, Pennsylvania had no system requiring the mandatory retirement of any of its public officials. In 1968, the Commonwealth adopted Article V, Section 16(b) of the Pennsylvania Constitution, which established the

mandatory retirement age of 70 for state judges.[1] Coincident therewith, Article V, Section 16(c) was adopted providing that "a former or retired justice or judge may, with his consent, be assigned by the Supreme Court on temporary judicial service as may be prescribed by rule of the Supreme Court." See p. 39a of Appendix hereto. By appropriate rules of Court and enabling legislation, a system for utilizing the skills and services of "retired" judges did thereafter become effective. In fact, during the 10 years that mandatory retirement of judges has been in effect in Pennsylvania, every judge who has reached the age of 70 while in office, and who has requested assignment to post-retirement service has been accepted and has so served. See pp. 37a; 48a-50a of Appendix hereto. Judges serving after the age of 70 in Pennsylvania are popularly referred to as "senior judges."

Senior judges have come to form a significant and indispensable portion of the tremendously overburdened Pennsylvania judiciary. Comprising, at the time of trial, approximately fifteen percent of that entire statewide body, the service of senior judges has been essential to the administration of the court system in both the state as a whole, and in Philadelphia in particular, without which the services of a number of able, experienced judges would be lost, the speedy trial rule in criminal cases could not be complied with and the backlog of civil cases would be uncontrollable. The productivity of senior judges on a day-to-day basis has been equal to that of active judges.[2] See pp. 49a-50a of Appendix hereto.

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1. There remains, to date, no provision in Pennsylvania requiring the mandatory retirement of any other public officials.

2. As more fully discussed herein, the Court of Appeals in its opinion reversing the District Court inaccurately and without support, in the record, characterized the services of such senior judges as "part time." See p. 15a of Appendix hereto.

Despite the fact that senior judges perform the same duties as active judges and maintain the same standard, in terms of both quality and quantity, with respect to their work, senior judges have been placed in a substantially inferior economic position in comparison to active judges. The annual salary for Pennsylvania trial court judges on active service at times relevant to this lawsuit was $45,000. Additionally such judges are entitled to unlimited paid sick leave, paid vacation and pay regardless of whether the judge is in chambers or in court. See pp. 40a; 62a of Appendix hereto. On the other hand, a senior judge received as salary at the time relevant $125 per court day for days actually worked and was not entitled to any sick leave, vacation or chamber days. See pp. 40a; 62a of Appendix hereto. Thus, if a senior judge spent five days a week in court with no days off for illness, no vacation and no chamber days, the most he could earn per year would be $30,500. See p. 62a of Appendix hereto (figure erroneously computed at $32,500).

The earnings of senior judges are further limited by the availability of funds appropriated specifically for that purpose. See pp. 40a; 62a of Appendix hereto. During the past several years the legislative appropriations have not been large enough to pay the per diem salary for all the days of service of qualified and available senior judges whose services were needed by the courts of Common Pleas and as a result many senior judges worked part of the time for no compensation at all. See pp. 40a; 62a of Appendix hereto.

An additional inequity results from the operation of the pension system with respect to senior judges. During the course of their active service, judges in Pennsylvania are required to make contributions to a pension fund, which contributions are considered income for federal tax

purposes at the time earned. See p. 41a of Appendix hereto. This money then appreciates in the pension fund at four percent annual interest. Not only are the earnings of senior judges limited by statute so that a combination of his per diem salary plus his pension benefits will not exceed $45,000 per year,[3] see p. 43a of Appendix hereto, but, while judges under 70 on active service acquire additional retirement benefits with added service, senior judges not only do not acquire additional benefits during post-retirement service, but the pension payments received by them during such service actually diminish the pension estate available to that judge and his beneficiaries.

Uncontradicted testimony by petitioners' duly qualified experts established on record, that based upon available scientific studies and testing procedures, the most critical factor in cerebral function is the physical health of an individual rather than his chronological age. The expert evidence additionally established that professional persons, such as doctors, lawyers and judges, as a general rule retain their abilities coincident with good health until very late in life, and in fact, tend to gain, rather than lose their intellect as they become older. See pp. 43a-44a; 48a of Appendix hereto.

The principal purpose behind the adoption of the mandatory retirement provision of the Pennsylvania Constitution, as determined by the trial court on the basis of evidence and argument presented by respondents was the removal of unfit judges from the bench. See pp. 48a-52a

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3. It is, of course, unfair to draw any comparison between the amount of salary earned by an active judge and the combined amount of earnings plus pension benefits of a senior judge, in that the pension benefits paid to a senior judge represents nothing more than a return of his own money together with that contribution made by the Commonwealth based upon his past service.

of Appendix hereto. The trial court found that reasonable, non-discriminatory, alternative means of effectively achieving such purpose did, in the form of a Judicial Inquiry and Review Board, exist. See p. 51a of Appendix hereto.

On the basis of his findings of fact, Judge Ditter, on September 4, 1979 handed down an Adjudication and Order holding that the mandatory retirement provision of Article V, Section 16(b) of the Pennsylvania Constitution is in conflict with both the Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution at least insofar as it applies to Common Pleas judges, declaring said provision null and void, and restraining the enforcement of this provision and all of its enabling statutes as to any judge of the Court of Common Pleas. See pp. 63a-64a of Appendix hereto. The decision of the trial court was reversed on May 13, 1980 by a panel of the Third Circuit Court of Appeals, which held that Article V, Section 16(b) does not violate the Fourteenth Amendment. See pp. 3a; 15a; 25a of Appendix hereto.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with the spirit of this Court's recent decisions concerning the constitutionality, on the grounds of equal protection, of mandatory retirement systems and contrary to the principles enunciated therein.

This Court has, in two recent decisions, upheld against constitutional challenge on equal protection grounds, systems providing for the mandatory retirement of public employees at a specific age. *Vance v. Bradley,* 440 U.S. 93, 99 S. Ct. 939, 59 L.Ed.2d 171 (1979); and *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S. Ct. 2562, 49 L.Ed.2d 520 (1976). In rendering those decisions, however, both of which are materially different factually from the present case, this Court made it emphatically clear that in order to withstand constitutional scrutiny under the equal protection clause, a system of compulsory retirement must not "exclude so few (employees) who are in fact unqualified as to render (the applicable age) a criterion wholly unrelated to the objective of the statute." *Massachusetts Board of Retirement v. Murgia,* 427 U.S. at 315-16, 96 S. Ct. at 2568, 49 L.Ed.2d at 526.

In the *Murgia case,* the plaintiff, a Massachusetts state police officer, made a broad frontal attack on the Massachusetts law which required that uniformed state police officers retire at age 50, alleging that the establishment of a mandatory retirement age violates equal protection of the law. Applying the rational relationship test,[4] this

4. This Court has developed a two-tiered approach to evaluating the constitutionality of statutes under the Equal Protection Clause of the Fourteenth Amendment. Under this analysis, the

Court, after careful analysis, held that mandatory retirement of state police officers at age 50 was rationally related to the purpose of assuring physical preparedness of its uniformed police.

In reaching that conclusion, this Court in *Murgia* stressed the arduous physical demands of a police officer's job and the fact that "even [the plaintiff's] experts concede that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job" (427 U.S. at 310-11, 96 S. Ct. at 2565, 49 L.Ed.2d at 523). This Court also stressed the fact that

> There is no indication that [the statute in question] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute (427 U.S. at 315-16, 96 S. Ct. at 2568, 49 L.Ed.2d at 526).

In the *Vance* case, the plaintiffs, a group of Foreign Service employees, attacked a federal statute requiring the retirement at age 60 of federal employees covered by the Foreign Service retirement and disability system on the extremely narrow ground that it violated equal protection because employees covered under the Civil Service retirement and disability system were not required to retire until age 70. This Court upheld the statute following its earlier decision in *Murgia*. Again, applying the less stringent analysis, this Court, in finding a rational relationship in *Vance*, stressed the desirability of stimulating the highest

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court applies the rational relationship test in situations not involving any "fundamental rights" or "suspect classifications." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17, 93 S. Ct. 1278, 1287-88, 36 L.Ed.2d 16 (1973).

performance in the ranks by assuring the opportunity for promotion despite the limited number of personnel in various classes (440 U.S. at 101, 99 S. Ct. at 945, 59 L.Ed.2d at 178). The Court also stressed the rigors of overseas duty to which Foreign Service employees are subjected (440 U.S. at 104, 99 S. Ct. at 947, 59 L.Ed.2d at 180). And the Court concluded that even if the line drawn by Congress is under-inclusive because it does not require retirement at 60 of Civil Service employees serving overseas. It, nevertheless, does not violate equal protection.

An analysis of the factual distinctions between both *Murgia* and *Vance*, and the present case, makes it clear that the Pennsylvania system of mandatory retirement of judges violates equal protection under the rationale of those cases. First, and foremost, not only does the evidence produced in the present case fail, as required by *Murgia* and *Vance*, to indicate that more than a few of those judges excluded upon reaching the age of 70 would be unqualified; the *stipulated* facts reveal that, in the face of a statewide shortage of judges, in the 10 years that mandatory retirement has been in effect in Pennsylvania, not a single judge has been involuntarily retired from service, see pp. 37a, 48a-50a of Appendix hereto, and further that the services of senior judges have been essential to the operation of the Pennsylvania judicial system. See pp. 49a-50a of Appendix hereto. Second, the uncontradicted scientific evidence in this case, unlike in *Vance* and *Murgia*, revealed no relationship upon which one could justify the disputed system of compulsory retirement. See pp. 43a-44a; 48a of Appendix hereto. Finally, both *Murgia* and *Vance* involved occupations that are physically taxing. Thus, as is pointed out above, the Supreme Court in *Murgia* stressed the "arduous" nature of a police officer's duties (427 U.S. at 41, 96 S. Ct. at 2565, L.Ed.), and in *Vance* stressed the rigors of overseas duty by Foreign Serv-

ice employees (440 U.S. 101, 99 S. Ct. at 945, 59 L.Ed. at 178, 179). By way of contrast, however difficult a judge's duties may be, they do not involve any physical labor.

2. The Court below erred in reducing the entire argument of Petitioners, and the holding of the District Court, with respect to equal protection, to a single inaccurate footnote while using the bulk of its opinion to deal with an issue which it created and which was neither argued by the Petitioners nor relied on by the District Court.

Constrained by the obvious dictates of *Murgia* and *Vance*, Petitioners made it exceedingly clear in the opening statement by their counsel in the trial court, in their brief in the trial court, in their Court of Appeals brief, and at oral argument before the Court of Appeals that the point of their equal protection attack was aimed not at the concept of mandatory retirement *per se* but rather at the stipulated and uncontradicted facts in the record of the present case. Those facts, as pointed out above, reveal the evil of the Pennsylvania system which has eliminated no unfit judges but on the contrary has utilized the vast experience of judges reaching 70, paying those judges substantially less than is paid to judges under 70 for the same work.

Based upon these uncontradicted facts, the trial judge held:

> While considering this system of compensation, it is to be kept in mind that the state has not yet turned down an application for senior judge duties, and relies on senior judges as an essential part of its court system. It becomes readily apparent that this system is not in any way related to the removal of unfit

judges from the bench. The fact is that the present system does not mandate retirement from the bench at all. Rather, it simply mandates retirement from full salary. Removal from the bench has been for all practical purposes, a voluntary matter.

Neither *Murgia* nor *Vance* involved situations where employees were forced to retire, allegedly, because they were too old to do their jobs, only to be allowed back into doing precisely what they had done before, albeit for a considerably reduced salary. In both of those cases, there was a clear basis for believing that employees would lose their ability to perform their jobs effectively as they reached advanced ages. Here, by contrast, the state's own conduct shows not only that no such basis exists, but also that the state never truly believed in its existence. The state encourages judges to work past 70, has never turned down a request for post-70 judicial duties, and even relies on the work of judges over 70 to keep its court system operating effectively. Nevertheless, it chooses to pay these judges at a significantly reduced rate, for no apparent reason other than age. *In short, the mandatory retirement system is merely a thinly veiled scheme for acquiring cheap judicial labor.* In practical application, the system bears no rational relationship to the state's purpose of removing unfit judges. I conclude, therefore, that this system violates plaintiffs' right to equal protection of the laws. See pp. 62a-63a of Appendix hereto.

The Court of Appeals, nevertheless, through its panel decision, virtually ignores these facts and treats the case as if the plaintiffs had made a *per se* attack on mandatory retirement. No mention whatsoever is made of the fact

that not a single judge has been forced off the bench at age 70.[5] The sole mention of the argument on which the plaintiffs relied and on which the district court based its conclusions appears in a single footnote, see p. 15a of Appendix hereto, where the panel erroneously justifies the lower rate of pay for senior judges on the ground, unsupported by the evidence, that their employment is "part-time", totally ignoring the fact that the stipulated and uncontradicted evidence is that senior judges, during the period they work, work as hard and long as active judges, although generally they do not work all year. Moreover, the panel, in its footnote, attempts to justify the lower salary for senior judges on the ground that they receive a pension, totally ignoring the fact that a substantial part of the pension is the judge's own money deducted from his salary during his years of service, on which he has already paid income tax and which has appreciated in the hands of the Commonwealth at the meager rate of four percent interest. See p. 41a of Appendix hereto. The Court of Appeals has thereby so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's jurisdiction.[6]

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5. The court does without any foundation in the record state that from 1969 through 1978, only one common pleas judge was removed from office for any reason. See p. 13a of Appendix hereto.

6. Had the Court of Appeals properly confronted the issue placed before it by plaintiffs, its reliance upon not only *Vance* and *Murgia*, but upon *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir. 1979, *cert. denied*, — U.S. —, 100 S. Ct. 219, 62 L.Ed.2d 142 (1979), would have proven inappropriate. There was no indication in *Trafalet* that a substantial number of judges reaching age 70 continued judicial service as senior judges and the Court in that case, paraphrasing the aforecited portion of the *Murgia* decision, specifically held:

> When, however, a statutory requirement of retirement at a given age is tested by the rational relationship standard, the line drawn by the legislature will be accepted where [t]here

3. The Court below erred in not following the decision of this Court in *Cleveland Board of Education v. LaFleur* with respect to Plaintiffs' Due Process argument.

Faced with factual circumstances virtually identical to those presently before it, this Court in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 31 L.Ed.2d 52 (1974), held that local school board regulations requiring every pregnant school teacher to take maternity leave without pay at prescribed times before and after delivery regardless of the individual teacher's ability to perform, violated her rights under the Due Process clause by creating an "irrebuttable presumption" of incompetency.[7] Adopting a line of reasoning quite distinct from

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> is no indication that [the statute] has the effect of excluding from service so few . . . who are in fact unqualified as to render age a criterion wholly unrelated to the objective of the statute. (594 F.2d at 627). (Omissions in original).

Furthermore, there was no suggestion that judges performing post retirement service in Illinois, whose mandatory judicial retirement laws were under attack in *Trafelet*, received less salary for the same work compared to judges under the retirement age. As a matter of fact, the Illinois mandatory retirement system which was involved in *Trafelet* includes the following provision:

> (a) The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age. Any retired Judge or Associate Judge, with his consent, may be assigned by the Supreme Court, to judicial service *for which he shall receive the applicable compensation* in lieu of retirement benefits. A retired Associate Judge may be assigned only as an Associate Judge. (Emphasis added) (*Ill. Const. Art.* §15(a)).

7. The irrebuttable presumption doctrine while given renewed vitality in *LaFleur, supra*, 414 U.S. 632, 94 S. Ct. 791, 31 L.Ed.2d 52 (1974), was rooted in a series of earlier decisions. *See, e.g., U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508, 93 S. Ct. 2832, 37 L.Ed. 2d 767 (1973) (Irrebuttable presumption that household is ineligible for food stamps if it contains 18 year old claimed as dependent on tax return is invalid); *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230,

any form of equal protection analysis, this Court, in *La-Fleur,* made a determination that such regulations, while legitimate (and ostensibly rationally related to a proper objective) were, by virtue of their overbreadth, nevertheless constitutionally deficient.

This Court held:

> The question remains as to whether the cutoff dates at the beginning of the fifth and sixth months can be justified on the ground advanced by the school boards —the necessity of keeping physically unfit teachers out of the classroom. There can be no doubt that such an objective is perfectly legitimate both on education and safety grounds.
>
> And, despite the plethora of conflicting medical testimony in these cases, we can assume, *arguendo,* that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy. The mandatory termination provisions of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly. [Citation]

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37 L.Ed.2d 63 (1973) (Irrebuttable presumption of non-residency for purpose of qualifying for reduced tuition at state university is invalid); *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972) (Irrebuttable presumption that unmarried father is not competent to raise child is invalid); *Carrington v. Rash,* 380 U.S. 89, 85 S. Ct. 775, 13 L.Ed.2d 675 (1965) (Irrebuttable presumption that serviceman is non-resident for voting purposes is invalid); *Heiner v. Donan,* 385 U.S. 312, 52 S. Ct. 358, 76 L.Ed. 772 (1932) (Irrebuttable presumption that transfers for inadequate consideration within two years of death were made in contemplation of death for federal estate tax purposes is invalid); *Schlesinger v. Wisconsin,* 270 U.S. 230, 46 S. Ct. 260, 70 L.Ed.2d 557 (1926) (Same as to irrebuttable presumption for state inheritance tax purposes).

> That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary (414 U.S. at 643-44, 94 S. Ct. at 798, 37 L.Ed.2d at 62).

Quoting with approval from its prior decision in *Vlandis v. Kline*, 412 U.S. 441, 446, 93 S. Ct. 2230, 2233, 37 L.Ed.2d 63 (1973), which had invalidated a state statute mandating an irrebuttable presumption of non-residency for the purpose of qualifying for reduced tuition at a state university, this Court in *LaFleur*, further held:

> '[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination' (414 U.S. at 644-45, 94 S. Ct. at 798, 39 L.Ed.2d at 63).

The trial court correctly applied the irrebuttable presumption doctrine to the present case. It determined that Article V, Section 16(b) of the Pennsylvania Constitution offends Due Process by creating a presumption that all

judges over the age of 70 are incompetent to perform their judicial duties, and that such presumption operates to preclude individual determinations of judicial competency notwithstanding the fact that "it is untrue in most, if not all cases", and the fact that "reasonable alternative means exist by which the state can accomplish the rule's intended purposes", see pp. 45a-58a of Appendix hereto.

Despite Judge Ditter's cogent analysis, the Court of Appeals erroneously reversed the trial court's application of the irrebuttable presumption doctrine, see pp. 15a-25a of Appendix hereto. Acknowledging, at least implicitly, the continued viability of the doctrine generally,[8] see pp. 15a-16a of Appendix hereto, the Third Circuit panel decision offered no basis upon which to avoid its application other than a spurious distinction which it created between the interest involved in "freedom of personal choice in matters of marriage and family life" in *LaFleur*, and the interest involved in employment underlying the present controversy. See pp. 19a-20a of Appendix hereto. The Court of Appeals concluded that the former, but not the latter, interest implicated fundamental rights protected under the Due Process Clause. In this reasoning, the Court of Appeals erred. See pp. 19a-20a of Appendix hereto.

While it is true that employment is not such a "fundamental" right that the strict scrutiny standard of equal protection analysis[9] would apply, neither is one's personal choice in matters relating to marriage and family. This Court, in *LaFleur* nowhere suggested that it was. Further-

8. The decision of this Court in *LaFleur* has been distinguished, and deemed to be inapplicable to a certain specific category of cases, here not relevant. *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975). The appropriate application of the irrebuttable presumption doctrine has never, however, been overruled, or placed in serious doubt, by this Court.

9. See footnote 4, *supra*.

more, it is certain that the right of employment is no less protected under the United States Constitution, than are the rights involved in *LaFleur*.

This Court has long emphasized that the right to work has its roots in the Constitution, is of vital importance to the individual, and is constitutionally protected. In *Truax v. Raich*, 239 U.S. 33, 41, 36 S. Ct. 7, 10, 60 L.Ed. 131 (1915) this Court held that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." In *Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S. Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), the Court described the Fourteenth Amendment's guarantee of liberty as including "the right of the individual to . . . engage in any common occupations of life." And in *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 102, 83 S. Ct. 1175, 1180, 10 L.Ed.2d 224 (1963), this Court held that a "State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. Finally, the significance of *LaFleur* to the case presently before this Court with regard to compulsory retirement is particularly emphasized by the following statement made by Justice Rehnquist in his dissenting opinion in the *LaFleur* case:

> More closely in point is the jeopardy in which the Court's opinion places longstanding statutes providing for mandatory retirement of government employees.
>
> * * *
>
> *Since this right to pursue an occupation is presumably on the same lofty footing as the right of choice in*

> *matters of family life, the court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees.* In that event federal, state, and local governmental bodies will be remitted to the task, thankless both for them and for the employees involved, of individual determinations of physical impairment and senility (414 U.S. at 659-60, 94 S. Ct. at 805-6, 39 L.Ed.2d 71). (Emphasis added.)

4. The decision below is incorrect with respect to its review of the District Court's Equal Protection and Due Process analysis, and with respect to its own substituted analysis thereof.

The District Court based its determination that the Pennsylvania system of mandatory retirement for judges is unconstitutional upon its conclusions that (1) in practical application, the system bears no rational relationship to the state's purpose of removing unfit judges (See p. 63a of Appendix hereto); and (2) while in itself serving a legitimate purpose, the system "sweeps too broadly" thus creating an impermissible, irrebuttable presumption of unfitness. See pp. 48a-49a of Appendix hereto.

In applying both equal protection and due process analysis to the facts before it, the District Court correctly determined, on the basis of the argument and uncontradicted evidence presented by defendants that the primary purpose of mandatory retirement of judges in Pennsylvania is the removal of unfit judges. See pp. 48a; 61a-63a of Appendix hereto. The defendants argued this position in both their trial brief, and their brief in the Court of Appeals. Moreover, the defendants assertion as to the intended purpose of the mandatory retirement provision is

amply supported by the history of the provision. Reference Manual Number 5, prepared for the Constitutional Convention, which adopted Article V, Section 16(b), put into evidence by the Commonwealth, and relied on so heavily by the Court of Appeals, see pp. 3a-4a; 5a-6a; 12a-14a of Appendix hereto, is replete with references to the mandatory retirement of unfit and senile judges, as is the Journal reporting the discussion of the provision on the convention floor. 2 J. of the Const. Conv. 1078-79 (1967-8).

The Court of Appeals expressly acknowledged the logic inherent in the district court's analysis. See page 11a of Appendix hereto. It nevertheless sidestepped the record in holding that the district court had mischaracterized the primary purpose of 16(b), and in supplying its own substituted determination of such purpose(s).

Moreover, even if the four reasons gleaned by the Court of Appeals from the Reference Manual as being the basis of mandatory retirement were accepted for purposes of discussion they are not inconsistent with the purpose of removing unfit judges and their application to the facts of the present case is not rationally related to a legitimate state purpose, and, therefore, the retirement provision is unconstitutional. The four purposes set forth by the panel are: (1) increase judicial manpower by retiring older judges but retaining their services while bringing in new younger judges; (2) eliminate the unpleasantness of removing aged and disabled judges on an individual basis; (3) prevent the harm by a few senile judges; and (4) correspond with the current trend toward mandatory retirement. See page 5a of Appendix hereto.

The mandatory retirement system of judges that exists in Pennsylvania is not rationally related to any of these

purposes. While the first purpose of increasing judicial manpower may, in fact be furthered, by reducing 70 year old judges to a senior judge status, it furthers that purpose in a totally arbitrary rather than rational way. Since the older judges are not deemed in any way to be unfit to serve and are all actually permitted to serve with their services being essential to the operation of the judicial system, it is no more rational to choose them for reduction to an inferior status than it would be to choose judges whose names begin with certain letters in the alphabet. Moreover, paying these judges less money for the same work as active judges is completely without justification. The second purpose—eliminating the unpleasantness of removing aged and dissabled judges on an individual basis—and the third purpose—preventing the harm by a few senile judges are both clearly not rationally related to the Pennsylvania system of mandatory retirement of judges. Under the system, where all judges who desire to, are permitted to serve beyond 70, those judges who may become aged or disabled must still be removed on an individual basis, or if they are not, the potential for harm from the few senile judges still continues to exist.

5. The decision below raises important constitutional issues of substantial public concern.

The decision of the Court of Appeals for the Third Circuit raises important constitutional issues which impact directly, and in some cases immediately, upon the more than 300 trial judges in the Commonwealth of Pennsylvania. If the decision is permitted to stand, each such judge who has attained, or in the future, while in office might attain the age of 70, will suffer a constitutional deprivation in being forced to choose between the equally

unsatisfactory alternatives of having his employment terminated entirely, or continuing to perform in exactly the same capacity as theretofore but at an inferior status.

The effect of the lower court's decision is not, however, limited to its impact upon the judges of the Court of Common Pleas. Its more universal significance lies in its power to lend legitimacy to a potential exploitation of countless numbers of "older people" in this nation whose physical and mental abilities permit, and in many cases, financial needs compel, them to continue or return to employment beyond ages which have traditionally been associated with retirement. The incidence of such "post retirement age" service appears to be on the increase, running parallel to advances in medical science, and to the downward turn in this nation's economy. Senior citizens, who have been weakened by a pattern of discrimination generally, and healthy senior citizens, who often represent a minority amongst their ranks, specifically, are particularly susceptible to disparate treatment in such matters as equality of wages and employment.

The problem has become even more crucial in the wake of this Court's decisions in *Massachusetts Board of Retirement v. Murgia, supra,* and *Vance v. Bradley, supra.* These decisions, while contrary to the type of discriminatory treatment as that described above, are, in their approval of the broad concept of mandatory retirement *per se,* susceptible to misinterpretation, and capable of abuse. It is incumbent upon this Court, therefore, to clarify its opinions in *Murgia* and *Vance,* and to make clear, in particular, that its approval of mandatory retirement may not be used to justify a system, like that in the present case, where in fact no compulsory retirement exists, but merely a reduction in salary and status based solely upon chronological age.

In granting Certiorari, this Court must confront this timely issue and proscribe determinatively, pursuant to the dictates of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, any discriminatory treatment such as that characterized by Judge Ditter, in this case, as a "thinly veiled scheme for acquiring cheap ... labor." See page 63a of Appendix hereto.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2467

MALMED, EDWIN S., KUBACKI, STANLEY L., LAGAKOS, GREGORY G., MURPHY, JOSEPH T., STERN, JAMES L.

v.

THORNBURGH, RICHARD L., Individually and as Governor of Pennsylvania, ALLEN, ETHEL D., Individually and as Secretary of the Commonwealth of Pennsylvania, CASEY, ROBERT E., Individually and as Treasurer of the Commonwealth of Pennsylvania, and BARBIERI, ALEXANDER F., Individually and as Pennsylvania State Court Administrator,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 78-1418)

Argued April 21, 1980
Before: ALDISERT, WEIS and GARTH, *Circuit Judges*

(Filed May 13, 1980)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

This appeal by four Pennsylvania officials requires us to decide if Article V, §16(b) of the Pennsylvania Constitution, which requires retirement of state judges at age seventy, violates the equal protection and due process clauses of the fourteenth amendment. The district

court held that it does and enjoined the appellants from enforcing the provision and its enabling statutes. Because we conclude that Article V, §16(b) does not violate the fourteenth amendment, we reverse.

Five judges of the Court of Common Pleas of Philadelphia County, each of whom is nearing his seventieth birthday, brought this action for declaratory and equitable relief against the Governor, the Secretary of the Commonwealth, the Treasurer, and the Court Administrator of Pennsylvania. The action was tried without a jury on April 17, 18, and 20, 1979. On September 21, 1979, the court handed down its opinion and order, *Malmed v. Thornburgh*, 478 F.Supp. 998 (E.D.Pa. 1979), containing extensive findings of fact. It held that the mandatory retirement provision of Article V, §16(b) conflicts with both the due process and equal protection clauses of the fourteenth amendment of the United States Constitution, declaring the provision null and void, and enjoining the enforcement of the provision and its enabling statutes "as to any judge of the Court of Common Pleas." 478 F.Supp. at 1016. Governor Thornburgh and the other named defendants have appealed.

I.

A special constitutional convention convened in 1967 and made recommendations for revising the Pennsylvania Constitution in four discrete fields: legislative apportionment; judicial administration, organization, selection, and tenure; local government; and taxation and state finances. A new Judiciary Article was adopted on April 23, 1968, including Article V, §16(b), which provides in relevant part: "Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years." This article was the product of extensive deliberation by the Judiciary Subcommittee of the Preparatory Committee for the Pennsylvania Constitutional

Convention, under the direction of Dean Burton R. Laub. The subcommittee identified as a matter of concern "the problem of retiring judges who are mentally or physically unable to perform their duties either by reason of old age or by reason of some mental or physical ailment."[1] The subcommittee described this problem as

> a sensitive and delicate matter. Practically all lawyers and judges are familiar with the problem, but prefer to keep it in the legal family. Too often the disabled judges choose to remain on the bench despite their failing powers. Why do aged and disabled judges refuse to retire? There probably are many reasons, some personal and others objective. Some prefer the active life of a judge to the withdrawal of retirement. Others are not financially independent, and may find retirement and disability pensions inadequate.[2]

In Reference Manual No. 1, distributed to the delegates by the Preparatory Committee, chaired by then Lieutenant Governor, now United States District Judge, Raymond J. Broderick, the committee stated: "Mandatory retirement does substantially increase judicial manpower when a plan for part-time post-retirement service exists. The combined old experience and new energetic manpower helps alleviate case back-log."[3] Noting that "[a]bout one-half of the states require judges to retire at a fixed age, with seventy years being the most common,"[4] the Judiciary Subcommittee summarized the ar-

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1. Judiciary Subcomm. of the Preparatory Comm. for the Pennsylvania Constitutional Convention, Reference Manual No. 5, at 199 (1968) [hereinafter cited as Reference Manual No. 5]. Reference Manual No. 5 is reprinted in App. at 312a.

2. *Id.* at 199.

3. Preparatory Comm. for the Pennsylvania Constitutional Convention, Reference Manual No. 1, at 50 (1968) [hereinafter cited as Reference Manual No. 1].

4. Reference Manual No. 5, *supra* note 1, at 202 (citing *Summaries of Judicial Salaries and Retirement Plans*, 49 J. Am. Jud. Socy. 168 (Feb. 1966)).

guments favoring a mandatory retirement provision. In Reference Manual No. 5, it noted that a mandatory retirement policy

> substantially increases judicial manpower when a plan for part-time post-retirement service exists. By continually bringing in younger judges while retaining the part-time services of willing and able retired judges, a system of mandatory retirement plus post-retirement service helps solve the pressing problem of court congestion and delay. As mentioned previously, Pennsylvania already has provided for voluntary post-retirement service.
>
> eliminates unpleasantness of removing aged and disabled judges on an individual selective basis. Mandatory retirement is more impersonal than individual removal; everyone is treated alike. The difficulty and unpleasantness of determining which judges are senile and which are not is largely avoided.
>
> prevent[s] harm by few senile judges [which] more than offsets loss of judges who retain full powers past normal age. Besides, the services of able retired judges may be secured by a provision for post-retirement service.
>
> corresponds with current trend towards mandatory retirement in other public and private employments. There appears to be no good reason why judges should be treated differently from other public officials, teachers, executives, and other professional people who are subject to compulsory retirement.[5]

The subcommittee reported that the American Bar Association had proposed that judges be required to retire at an age fixed by statute, but not less than age sixty-five.[6]

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5. Reference Manual No. 5, *supra* note 1, at 203-04.

6. ABA Model State Judiciary Article §6, ¶2, *reprinted in* Reference Manual No. 5, *supra* note 1, at 394, 398.

Moreover, the Pennsylvania Bar Association had advocated mandatory retirement for Pennsylvania trial judges at an age not younger than seventy.[7] The National Municipal League had made a similar recommendation in its model state constitution.[8]

The parties have stipulated that the Judiciary Subcommittee of the Preparatory Committee drafted what subsequently became Article V of the Pennsylvania Constitution when ratified by popular vote on April 23, 1968.[9] A fair reading of Reference Manual No. 5 and a thorough examination of the Journal of the Constitutional Convention discloses no basis for the district court's major premise that the predominant purpose of §16(b) is "a presumption that all judges become incompetent to perform their judicial duties when they reach 70 years of age . . . ." 478 F.Supp. at 1008.[10] Therefore, the reasons

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7. Reference Manual No. 5, *supra* note 1, at 203. Bernard G. Segal, Esquire, representing the Pennsylvania Bar Assocation, observed in his statement before the committee:

> It is regrettable, but grimly true, that one bad Judge can undo the efforts of a hundred excellent Judges, and this is greatly accentuated during these days when factors beyond the control of any Judge, like those causing delays of four or five years in the trial of a case in Philadelphia, create general dissatisfaction with our judicial system. . . . [E]ven a very few unfit Judges constitute a serious impediment to the efficient administration of justice.

Preparatory Comm. of the Pennsylvania Constitutional Convention, Testimony at Public Hearings and Other Statements: Judiciary 18 (1967-1968) (Statement of Bernard G. Segal on behalf of the Pennsylvania Bar Association).

8. Reference Manual No. 5, *supra* note 1, at 203.

9. Stipulation Numbers 75 and 76, App. at 342a.

10. The provision was included in the original draft presented to the convention by the Judiciary Committtee chaired by Governor William W. Scranton and Gustave Amsterdam. I Debates of the Pennsylvania Constitutional Convention of 1967-1968 at 444 (Feb. 5, 1968) [hereinafter cited as Debates]. Section 16(b) was first set forth as §14(b). There was no floor discussion of the section during the first and second consideration of the draft on the convention floor.

stated to the delegates by the convention's Preparatory Committee are central to a proper analysis of §16(b) because they constitute the only record of the legislative purpose underlying the provision.

In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers *any* legitimate state objective. "For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . .." *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). The court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. *See Weinberger v. Salfi*, 422 U.S. 749, 780 (1975); *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 487-90 (1955); *Trafelet v. Thompson*, 594 F.2d 623, 626 (7th Cir.), *cert. denied*, —— U.S. ——, 48 U.S.L.W. 3239 (Oct. 1, 1979). The legitimate purpose justifying the provision need not be the primary purpose of the provision. *McGinnis v. Royster*, 410 U.S. 263, 276 (1973). Although our examination would not necessarily be limited to the purposes explicitly stated in the documents of the Judiciary Subcommittee, we conclude that the objectives therein are sufficient to uphold §16(b) under both the equal protection and due process clauses.

During the third consideration of the judiciary article the co-chairman of the Judiciary Committee Retirement Subcommittee stated

> that men who have attained 70 may be, both physically and mentally, extremely competent and may conceivably give something of everlasting significance to the judiciary. In accordance with this, the committee recommended that these judges who are over 70 years of age, although they were retired, could be used by the Supreme Court on temporary assignments throughout the Commonwealth.

II Debates, *supra*, at 1078 (remarks of Delegate Filson).

II.

The district court concluded that Article V, §16(b) violates the equal protection clause of the fourteenth amendment to the United States Constitution because it deprives appellees of their employment solely because they are seventy years old, thereby discriminating against them on the basis of age. By treating appellees differently than younger judges, the court held that the provision implicates the equal protection clause. Absent a rational relationship to a legitimate state objective the provision offends the equal protection clause. Before examining the court's equal protection analysis, we must consider the relevant teachings of the Supreme Court.

A.

Of the many equal protection decisions announced by the Supreme Court in recent years, two are particularly applicable. *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam). In *Murgia*, the Court rejected a challenge to a Massachusetts statute mandating retirement of uniformed state patrolmen at age fifty. The district court had held that the compulsory retirement requirement was not rationally related to the legislative objective of assuring physical ability of active officers. In reversing, the Court agreed with the district court that the rational basis standard of review was applicable, noting that the challenged statute affected neither a fundamental right nor a suspect class. 427 U.S. at 312-14. It disagreed with the district court's conclusion that the retirement statute failed to meet that standard, however, holding that "mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age." *Id.* at 315. The record contained evidence of the negative relationship between aging and the abilitiy to perform police duties. Significantly, however, the Court justified

its conclusion by placing the burden of persuasion on the police officers: "There is no indication that §26(3)(a) has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." *Id.* at 315-16 (footnote omitted). Thus, although the relationship between aging and diminished ability to perform was not invariable, the patrolmen attacking the statute had failed to demonstrate that the relationship on which the statute was undeniably based was actually unfounded in a significant number of cases.

The Court has recently examined a compulsory retirement statute in *Vance v. Bradley*. The Court rejected an equal protection attack on a federal statute requiring retirement at age sixty by employees covered by the foreign service retirement system, even though another statute allowed civil service personnel to work until age seventy.[11] The Court again noted the absence of a fundamental interest or a suspect class, and applied the rational basis standard. 440 U.S. at 97. In concluding that the statutory schema serves a rational basis, the Court reasoned that the mandatory retirement age of sixty attempts to "stimulat[e] the highest performance in the ranks of the Foreign Service by assuring that opportunities for promotion would be available despite limits on the number of personnel classes and on the number of positions in the Service." *Id.* at 101. It concluded that the mandatory retirement provision is not invalid because it is rationally related to the goal of high performance. *Id.* at 102.

This case also must be examined under the rational basis test. As the Court noted in *Murgia*, a class of persons composed of the elderly is not a suspect class. 427 U.S. at 313. Nor is the interest of appellees in public employment a fundamental interest. *Id.* Therefore, the

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11. By the time the decision in *Vance* was rendered, the retirement age for civil service personnel had been eliminated. 440 U.S. at 96.

standard by which we must review this provision of the Pennsylvania Constitution is the one employed in *Vance v. Bradley*:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

440 U.S. at 97 (footnote omitted). Having thus ascertained the proper standard for reviewing Article V, §16(b), we must now examine the district court's reasons for holding it violative of the equal protection clause.

B.

In its discussion of the equal protection contention, the district court properly acknowledged that "strict judicial scrutiny" is an inappropriate test in this context and that the proper scope of review is the "relatively relaxed" rational basis standard employed in *Murgia*. Even though it accepted the rational basis test, however, the district court concluded that no rational basis exists for the state constitutional provision. The court's analysis took as its major premise that the *only* basis for the state provision is its assumption that judges who are over seventy are unable to perform satisfactorily. 478 F.Supp. at 1008. Thus, the district court stated that "the record contains no proof of a relationship between advancing age and ability to perform the duties of a judge. On the contrary, the evidence before me belies the existence of

any such relationship." *Id.* at 1014. Proceeding on this extremely limited view of the purpose of §16(b), the court reached two intermediate conclusions to justify its ultimate determination of unconstitutionality. First, it concluded that the plaintiffs had met their burden of showing that judges who are aged seventy are not senile and are capable of performing their work. In the court's words, " 'the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " *Id.* at 1014 (quoting *Vance v. Bradley*, 440 U.S. at 111).[12] Second, the court cited the provisions allowing judges over age seventy to perform as "senior judges" as sufficient proof that the state does not actually perceive any relationship between advanced age and judicial incompetence. 478 F.Supp. at 1014.[13]

C.

Sound formal logic unquestionably inheres in the district court's analysis. The conclusion unerringly flows from its premises. But the court erred in choosing as its

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12. The district court apparently based this conclusion on findings of fact numbered 70 and 71, which state:

> 70. The mere fact that a judge reaches the chronological age of 70 does not affect his ability to perform his judicial duties and the vast majority of judges reaching the age of 70 are capable of continuing to perform those duties. See testimony of Doctors Obrist and Gorson, and Exhibits P-1, P-2, P-3, and P-4.
>
> 71. Persons, such as judges, who achieve success in learned professions are likely to retain their mental abilities for considerably longer periods of time than the population at large.

478 F.Supp. at 1006.

13. This conclusion apparently derives from finding of fact numbered 73, which states: "The service of senior judges called back to perform duties has been essential to the administration of the court system in Pennsylvania in general and the court system in Philadelphia in particular." *Id.* at 1006.

major premise that the basis of §16(b) is the inability of judges over the age of seventy to perform their judicial duties. Its subsequent analysis falters because the assumed basis for the constitutional convention's action misses by a wide mark the reasons set forth in the report of the Judiciary Subcommittee.

Moreover, by insisting that the appellants assume the burden of proving a rational relationship between the statute and a legitimate legislative goal, 478 F.Supp. at 1014, the district judge failed to heed the precise teachings of *Vance v. Bradley*:

> In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker [citations omitted]. As we have said in a slightly different context:
>
> > "The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.' "

440 U.S. at 110-11 (quoting *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P. R. Co.*, 393 U.S. 129, 138-39 (1968)). *See also Murgia*, 427 U.S. at 315-16.

In sum, the district court erroneously placed a burden on the appellants to rebut a limited argument presented by the appellees. The correct approach would

have been to require the appellees to prove that the Pennsylvania Constitutional Convention had no reasonable basis for believing the four reasons stated for the adoption of the mandatory retirement provision. See *Vance v. Bradley*, 440 U.S. at 112. We conclude that the purposes actually given for the provision are legitimate and do have a rational relationship to the mandatory retirement age.

Reference Manual No. 5 listed four separate reasons in support of the provision, not one of which corresponds to the reason accepted by the district court as its major premise. First, by utilizing senior judges in part-time post-retirement service, the mandatory retirement plan substantially increases judicial manpower by bringing in younger judges while retaining the part-time services of willing and able retired judges. The legislative interest in reducing court congestion is certainly a legitimate state interest. *See* Administrative Office of Pennsylvania Courts, 1978 Annual Report 26, 27, 32. Even the district court's findings of fact demonstrate that retired judges have contributed significantly to the administration of justice in Pennsylvania. *See* note 13 *supra*. The conclusion is therefore inescapable that the constitutional provision is rationally related to the legitimate state interest specified in Reference Manual No. 5.

The second reason, that mandatory retirement eliminates the unpleasantness of selectively removing aged and disabled judges, and the third reason, that prevention of harm by a few senile judges more than offsets loss of judges who retain full powers past normal age, may be considered together. We cannot say that it would be irrational for Pennsylvania to be concerned with senility among state judges. Removal of individual judges for any reason has proved exceptional. During the ten year period from 1969 through 1978, only one common pleas court judge was removed from office for any reason. Even if the removal process were largely effective, the constitutional convention could have rationally

agreed that "one bad Judge can undo the efforts of a hundred excellent Judges," *see* note 7 *supra*, and then concluded from this premise that mandatory retirement would both remove the senile and place a limit on the tenure of judges afflicted with other types of incompetence. In addition, the convention could rationally place a premium on avoiding the unpleasantness and public humiliation associated with individual removal. *See* Reference Manual No. 5, *supra* note 1, at 203-04.

Fourth, the provision conforms to the recommendations of the American Bar Association, the Pennsylvania Bar Association, and the National League of Cities, and corresponds with the current trend toward mandatory retirement at seventy in other public and private employment. If uniformed state patrol officers, *see Murgia*, 427 U.S. at 315, and foreign service personnel, *see Vance v. Bradley*, 440 U.S. at 101, can be subjected to mandatory retirement, we have little difficulty sustaining as rational a retirement provision applicable to state judges. Indeed, in trying to conform the age for retirement of judges with the age for retirement of other state personnel, the convention could have placed heavy emphasis on treating individuals of the same age in a similar manner.

It bears repetition that the convention's judiciary committee did not defend the amendment on the basis accepted by the district court, that judges over seventy are unable to perform judicial duties satisfactorily. We therefore determine the district court's analysis to be deficient because it rests on a fundamental mischaracterization of the purpose of §16(b). Pennsylvania has attached special importance to increasing judicial manpower, to eliminating the unpleasantness of removing senile judges on an individual basis, to preventing the harm to litigants and to the entire judicial system caused by a few senile judges, and to conforming with a trend toward mandatory retirement in other private and public employments, and we believe its assessment is rational. "Whether or not individual judges may agree with this

assessment, it is not for the courts to reject it." *Vance v. Bradley*, 440 U.S. at 106.

As a federal court reviewing a state constitutional provision under the equal protection clause, we may not demand perfection, *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 385 (1960), or "mathematical nicety," *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). All we can do is determine whether the provision is rationally related to achieving a legitimate state objective. *Vance v. Bradley*, 440 U.S. at 97. Appellees' case condenses to their argument that judges over seventy are as reliable as judges under seventy. But the truth of this proposition does not establish a denial of equal protection. So long as a rational basis can be identified, and we can identify several here, our task is at an end. We conclude that Article V, §16(b) does not violate the equal protection clause.[14]

III.

But the bulk of the district court's analysis was its acceptance of the appellees' theory that §16(b) violates the due process clause. The court struck down the provision under a concept of substantive due process, de-

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14. The district court also relied on the lower rates at which senior judges are paid, characterizing the mandatory retirement system as "merely a thinly veiled scheme for acquiring cheap judicial labor." 478 F.Supp. at 1015. Having concluded that mandatory retirement *per se* does not violate the equal protection clause, we need only note that the legislature could rationally conclude that the state's need for part-time judicial manpower could be filled by paying a per diem rate lower than the daily salary paid to full time judges. In addition, the legislature could consider the state judicial pensions available to most state judges. This is *additional* compensation available to senior judges but not available to active judges. Although we may agree that compensation for senior judges is not generous, that fact is not relevant to a determination of whether retirement at age seventy, *per se*, has a rational basis.

scribed in some Supreme Court decisions in the early seventies as "the irrebuttable presumption doctrine." This conceptual framework requires careful analysis for proper application, as is now clear from *Weinberger v. Salfi*, 422 U.S. 749 (1975), and *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977).

A.

Of uneasy definition and uncertain status, the doctrine emanates from a series of Supreme Court decisions from 1971 to 1974. *Bell v. Burson*, 402 U.S. 535 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Vlandis v. Kline*, 412 U.S. 441 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). Each of these cases involved a statute containing rules that denied a benefit or placed a burden on all individuals possessing a certain characteristic. The characteristic is the basic fact from which a presumed fact is inferred. These decisions held that if it "is not necessarily or universally true in fact" that the basic fact implies the presumed fact, *Vlandis v. Kline*, 412 U.S. at 452, then the statute's irrebuttable presumption denies due process of law.[15] Its very name suggests an analysis grounded on formal logic, and a careful examination of the Supreme Court decisions that have applied it supports the conclusion that the doctrine is but another way of stating that a presumed fact must be based on reason, and that if a plaintiff demonstrates that the inference is not "rationally related" to a legitimate legislative classification, the inference will not pass constitutional muster. The decisions also suggest that in appropriate cases the classification must serve a compelling state interest.

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15. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534, 1534-36 (1974).

The five Supreme Court decisions that have employed the irrebuttable presumption analysis can be divided into two categories. The first category includes *Bell v. Burson*, 402 U.S. 535 (1971), *Vlandis v. Kline*, 412 U.S. 441 (1973), and *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973), each of which invalidated a classification adopted as an administrative device to serve as evidence of another classification. In *Bell*, the Court examined a Georgia procedure that mandated revocation of a driver's license if he had no liability insurance, was involved in an accident, and failed to post cash or bond in the amount of a claimant's alleged damages. In holding that the procedure violated the due process clause, the Court noted that before the driver could actually be held liable for the claimant's injuries, he would have to be adjudged negligent in the Georgia courts. But by revoking his license prior to this finding of negligence, the procedure "adjudicates important interests of the licensees." 402 U.S. at 539. Failure to accord an opportunity to rebut the presumption of fault thus violated the due process clause. By applying a general presumption that uninsured drivers who are involved in accidents will be held liable for those accidents, the procedure classified an individual driver as negligent even when "there is *no reasonable possibility* of a judgment being rendered against the licensee. . . ." *Id.* at 540 (emphasis added). The Court implicitly determined that the procedure lacked a rational relationship to the designated objective.

In *Vlandis*, the Court examined a Connecticut statutory presumption that all out of state applicants to state colleges were nonresidents for purposes of calculating tuition and would remain nonresidents for as long as they were students in Connecticut. The ultimate issue to be determined for each student was his or her residence, but the statute authorized a short-cut to this determination without providing the students an opportunity to controvert the conclusion. 412 U.S. at 445-46. Once

again, the procedure attempted to reach conclusions about an individual's status by examining a particular set of circumstances that bore no necessary relationship to the classification. The Court concluded that "[t]he State can establish such *reasonable* criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the state, but who have come there solely for educational purposes, cannot take advantage of the in-state rates." *Id.* at 453-54 (emphasis added). As we read *Vlandis*, the Court's decision rests on its determination that the presumption of nonresidence was not rationally related to the state's objective.

In *Murry*, the Court held invalid a regulation that denied food stamps to any household consisting of one or more persons over eighteen years of age who had been claimed as a dependent on a federal income tax return filed within the preceding two years by taxpayers who were themselves ineligible to receive food stamps. The legislative history of the provision indicated a congressional concern that nonneedy households were participating in the food stamp program. 413 U.S. at 512-13. The Court determined that the provision had no relation to the actual need of the persons affected, *id.* at 513, and concluded that "the deduction taken for the benefit of the parent in the prior year is *not a rational measure* of the need of a different household with which the child of the tax-deducting parent lives . . .." *Id.* at 514 (emphasis added). Once again, the Court used the rational basis analysis.

Bell, *Vlandis*, and *Murry* should not be expanded beyond their context. They involved administrative short-cuts by which individuals were determined to be ineligible for benefits. The ultimate criteria for eligibility were unchallenged in all three cases; the challenges were to the use of proxies to prove the ultimate criterion. In each case, the Court struck down the procedure because the proxy was not reasonably related to the ulti-

mate criterion. As noted earlier, the Pennsylvania constitutional provision at issue in this case attempts to serve four specific interests of the system, with the qualifications of each individual judge being unrelated to those interests. The provision does not use age seventy to reach a conclusion about individual judges. It uses that age to further important system-wide objectives. When a judge reaches age seventy, important interests of the system demand that even competent judges retire. Therefore, *Bell*, *Vlandis*, and *Murry* are not controlling here. *See Weinberger v. Salfi*, 422 U.S. at 771-72.

The second category contains *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). In both cases, the Court noted that the procedures implicated fundamental interests of the affected individuals. In *Stanley*, an unwed father sought to obtain custody of his children after their mother died. The statutory definition of "parent" applicable to custody disputes excluded natural fathers of illegitimate children, thus precluding Stanley, who had never been judged unfit to have custody, from obtaining custody. In striking the procedure, the majority recognized that "[t]he Court has frequently emphasized the importance of the family." 405 U.S. at 651. Similarly, in *LaFleur*, the Court struck down regulations requiring mandatory maternity leave for school teachers. Again noting that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," 414 U.S. at 639-40 (citations omitted), the Court concluded that the overly restrictive maternity leave regulations "can constitute a heavy burden on the exercise of these protected freedoms," *id.* at 640, for which the state could advance no justification. *See also Turner v. Department of Employment Security*, 423 U.S. 44 (1975) (per curiam). Even assuming that the Court's analysis in *Stanley* and *LeFleur* employed "strict scruti-

ny" rather than the rational basis standard, the existence of fundamental interests in those decisions distinguish them from this case.

We affirmed a district court order that employed the irrebuttable presumption analysis in *Gurmankin v. Constanzo*, 556 F.2d 184 (3d Cir. 1977). We relied on *LaFleur* in holding that a blind teacher was entitled to demonstrate her competence to teach an English course in the Philadelphia public schools. Although no fundamental interest or suspect class was implicated in *Gurmankin*, the court reasoned that the school district's policy of using blindness as an indication of competence violated due process by not allowing Gurmankin to demonstrate that she was actually competent. *Id.* at 187. In effect, the policy was not rationally related to the legitimate state goal of assuring teacher competence. "The very point of this case is that [by] denying Gurmankin the *opportunity* to take a qualifying exam, the defendants deprived her of the opportunity to present evidence of her qualifications." *Id.* at 187 n.5. Absent the fundamental interest involved in *LaFleur*, however, *Gurmankin* is more akin to the first category of irrebuttable presumption decisions, and should not control here because the qualifications of the judges are not at issue under §16(b).

As with any aspect of substantive due process, a court using the irrebuttable presumption doctrine must apply the rational basis test, or in appropriate cases, strict scrutiny. Otherwise, the courts would be resorting to blatant "Lochnerism," *see Lochner v. New York*, 198 U.S. 45 (1905), a concept that has been administered suitable last rites and mercifully interred. *See North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164-67 (1973); *Lincoln Federal La-*

bor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949).[16]

Thus, we do not read the irrebuttable presumption decisions as deviating substantially from the traditional tests for violations of the due process clause. Because no suspect class or fundamental interest is implicated in this case, we must apply the standard as explained in *Weinberger v. Salfi*, 422 U.S. at 777:

> [T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions, and would be directly contrary to our holding in *Mourning* [*v. Family Publications Service, Inc.*, 411 U.S. 356 (1973)]. Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters

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16. In *Lincoln Federal Labor Union*, in which the Court upheld state laws prohibiting union security agreements, the Court noted:

> This Court beginning at least as early as 1934, when [*Nebbia v. New York*, 291 U.S. 502 (1934] was decided, has steadily rejected the due process philosophy enunciated in the [*Adair v. United States*, 208 U.S. 161 (1908) and *Coppage v. Kansas*, 236 U.S. 1 (1915)] line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. [citations omitted]. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

335 U.S. at 536-37.

> out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.

See also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 23-24 (1976); *Marshall v. United States*, 414 U.S. 417, 427-28 (1974); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).[17] We must determine whether the Com-

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17. We are not unaware of the confusion caused by the irrebuttable presumption doctrine, particularly with regard to selection of the appropriate standard of judicial review of legislation attacked under the doctrine. The United States Court of Appeals for the Seventh Circuit, in a case virtually identical to this one, has concluded that the irrebuttable presumption analysis has been tacitly abandoned by the Supreme Court. *Trafelet v. Thompson*, 594 F.2d 623, 629-30 (7th Cir.), *cert. denied*, —— U.S. ——, 48 U.S.L.W. 3239 (Oct. 1, 1979). The Court of Appeals for the Second Circuit has deemed the doctrine merged into the equal protection clause except with respect to fundamental interests or suspect classifications. *Johnson v. Lefkowitz*, 566 F.2d 866, 869 (2d Cir. 1977).

In *Gurmankin v. Constanzo*, 556 F.2d 184 (3d Cir. 1977), we indicated that the Supreme Court in *Weinberger* had distinguished *LaFleur* because *Weinberger* involved government benefits. *Id.* at 187 n.5. Although this case does not involve government benefits, we are convinced that *Weinberger's* standard of review applies because it merely restates the well-accepted standard of review for due process challenges. In the context of government economic regulation, *see, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 23-24 (1976), government benefit payments, *see, e.g., Flemming v. Nestor*, 363 U.S. 603, 611 (1960), and legislation that is difficult to classify, *see, e.g., Marshall v. United States*, 414 U.S. 417, 427-28 (1974), the Court has applied the rational basis test. Even if we assume that mandatory retirement legislation is *sui generis*, *cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 18 (1973) (equal protection attack on Texas school financing system "in significant aspects is *sui generis*"), the rational basis test is still appropriate absent a fundamental interest or suspect class.

monwealth of Pennsylvania could have rationally concluded that a mandatory retirement age of seventy for its judges would promote the policies specified in the legislative history of Article V, §16(b).[18]

B.

In applying the irrebuttable presumption doctrine to this case the district court assumed erroneously that the major, if not the only, justification for §16(b) is the determination that judges over age seventy are unfit to judge. It then reasoned that because this presumed fact is not necessarily true, the provision offends the due process clause. The district court's logic is again unassailable, but its understanding of the constitutional convention's reasons for §16(b) is imperfect. This error results in no small measure from the failure of appellants to defend properly, before this court and the trial court, the action of Pennsylvania's Constitutional Convention. This failure is evident from the district court's discussion of what it described as "several lesser justifications [advanced by appellants] for the mandatory retirement rule."

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18. Were we to deem classifications based on age subject to strict scrutiny, we would place a wide range of state legislation in question. Any statute that uses age as a qualification creates an irrebuttable presumption that persons over or under the specified age are unqualified. *E.g.*, minimum ages for obtaining a driver's license, consumption of alcoholic beverages, and child employment. A further anomaly would arise because the United States Constitution itself creates irrebuttable presumptions based on age. *See* U.S. Const. Art. I, §2, cl. 2 (minimum age of twenty-five to serve in the House of Representatives); *id.* §3, cl. 3 (minimum age of thirty to serve in the Senate); *id.* Art. II, §1, cl. 5 (minimum age of thirty-five to serve as President); *id.* Amend. XXVI, §1 (minimum age of eighteen to vote). *Cf. id.* Amend. XXII, §1 (maximum of two terms as President). The history and widespread use of age classifications, as well as their constitutional sanction, militate against strict scrutiny of such classifications.

> First, the Commonwealth submits that the present system serves the purpose of "updating the judiciary by infusion of 'new blood' [knowledgeable] in modern trends in the law." The defendants have offered no evidence, however, to show that elderly judges are any less cognizant of modern legal trends than their younger counterparts. In fact, quite the opposite may be true. The record contains numerous references to the benefits which the judicial system derives from the wisdom and experience of former and retired judges who serve as senior judges. *See, e.g.*, Statement of Chief Justice Eagen Relative to Amendment of Pa.R.J.A. 701(a), October 5, 1977; see also Exhibit P-6. Absent persuasive supporting evidence, an intrusion on constitutional rights cannot be justified by the proposition that new blood is better than old blood.
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> The state further submits that the present system of mandatory retirement provides opportunities for elevation to the bench; avoids the difficulty of determining an individual judge's competence; and provides certain notice of upcoming judicial vacancies. While each of these purposes may be arguably legitimate, they are all matters of mere administrative convenience. Each can be amply served by other measures which do not infringe on constitutionally protected rights. "[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." *LaFleur, supra*, 414 U.S. at 647, 94 S.Ct. at 799.

478 F.Supp. at 1010. Although appellants repeat these and similar arguments before us, fortified with citations of case law, *see* Brief for Appellants at 17, these arguments miss the important issue in this case: Is the mandatory retirement age rationally related to the accomplishment of *any* legitimate state objective?

C.

The basic error committed by the district court in its due process discussion was the same one committed in its equal protection discussion; it proceeded on the premise that "[t]he principal basis advanced by the Commonwealth for the rule is the removal of unfit judges from the bench by means of mandatory retirement at age seventy." 478 F.Supp. at 1008. We have previously demonstrated in Part II, *supra*, that the premise on which the court relied is invalid.

In reviewing §16(b) under the due process clause, we must examine all legitimate objectives that the commonwealth could have considered to determine if any of them are rationally served by the provision. The district court's analysis of but one of the objectives, without considering the objectives explicitly stated in the reports of the drafters, does not comply with this precept. We have examined the provision in light of the four purposes contained in the Committee Report, and for the reasons detailed in Part II, *supra*, we conclude that §16(b) is rationally related to legitimate legislative objectives.[19]

IV.

Accordingly, we will reverse the judgment of the district court and remand these proceedings with a direction to enter judgment in favor of the appellants.

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19. Decisions of other courts support both of our conclusions, that mandatory retirement for state court judges violates neither the due process clause nor the equal protection clause. *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir.), *cert. denied*, —— U.S. ——, 48 U.S.L.W. 3239 (Oct. 1, 1979); *Rubino v. Ghezzi*, 512 F.2d 431 (2d Cir. 1975) (per curiam); *Boughton v. Price*, 70 Idaho 243, 215 P.2d 286 (1950); *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. 1978); *Nelson v. Miller*, 25 Utah 2d 277, 480 P.2d 467 (1971); *Aronstam v. Cashman*, 132 Vt. 538, 325 A.2d 361 (1974).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT

Civ. A. No. 78-1418.

E. D. Pennsylvania — September 21, 1979

EDWIN S. MALMED, STANLEY L. KUBACKI, GREGORY G. LAGAKOS, JOSEPH T. MURPHY and JAMES L. STERN,

Plaintiffs,

vs.

RICHARD L. THORNBURGH, Individually and as Governor of Pennsylvania, ETHEL D. ALLEN, Individually and as Secretary of the Commonwealth of Pennsylvania, ROBERT E. CASEY, Individually and as Treasurer of the Commonwealth of Pennsylvania, and ALEXANDER F. BARBIERI, Individually and as Pennsylvania State Court Administrator,

Defendants.

Stephen M. Feldman, Philadelphia, Pa., for plaintiffs.

Joseph K. Hegedus, Deputy Atty. Gen., Harrisburg, Pa., for Thornburgh, Allen and Casey.

Jonathan Vipond, III, Philadelphia, Pa., for Barbieri.

ADJUDICATION

DITTER, District Judge.

Plaintiffs in this case are five judges of the Court of Common Pleas of the First Judicial District of Pennsylvania, which consists of the County of Philadelphia. They brought this action to challenge the Pennsylvania Constitution's requirement that all state court justices, judges, and justices of the peace retire at age 70. The complaint charges that this provision violates the plaintiffs' rights to both due process and equal protection of the laws as secured by the Constitution of the United States. Plaintiffs ask me to declare that the mandatory retirement section of the Pennsylvania Constitution is null and void and that the defendant state officials should be enjoined from enforcing it.

[1] This case was tried without a jury. After considering all the evidence, as well as the briefs and arguments of counsel, I conclude that the first sentence of Article V, Section 16(b) of the Pennsylvania Constitution is in conflict with both the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, at least insofar as it applies to judges of the Courts of Common Pleas. This provision is therefore null and void, and its enforcement, as to Common Pleas Court judges, must be enjoined.

My holding is based upon the following

FINDINGS OF FACT

1. Plaintiff, Edwin S. Malmed, is a Judge of the Court of Common Pleas of the First Judicial District of Pennsylvania, composed of the County of Philadelphia, and was first appointed a Judge of the Court of Common Pleas on December 30, 1971. Plaintiff Malmed holds office by virtue of election in November, 1973, and pursuant a Commission issued by the Governor of Pennsylvania on December 10,

1973, which certified plaintiff Malmed's right to hold said office from the first Monday of January, 1974.[1]

2. Plaintiff Malmed will attain his seventieth birthday on January 2, 1982.

3. Plaintiff, Stanley L. Kubacki, is a Judge of the Court of Common Pleas of the First Judicial District of Pennsylvania, composed of the County of Philadelphia, and was first appointed a Judge of the Court of Common Pleas on December 30, 1971. Plaintiff Kubacki holds office by virtue of election in November, 1973, and pursuant to a Commission issued by the Governor of Pennsylvania on December 10, 1973, which certified plaintiff Kubacki's right to hold said office from the first Monday of January, 1974.

4. Plaintiff Kubacki will attain his seventieth birthday on August 25, 1985.

5. Plaintiff, Gregory G. Lagakos, is a Judge of the Court of Common Pleas of the First Judicial District of Pennsylvania, composed of the County of Philadelphia. Plaintiff Lagakos was appointed as a Judge of the County Court of Philadelphia on August 26, 1965, and elected in November, 1965, for a ten year term commencing in January 1966. On January 1, 1969, by virtue of an amendment of the Pennsylvania Constitution, plaintiff Lagakos became a Judge of the Court of Common Pleas for a term to be completed in January 1976. Plaintiff Lagakos was retained in an election in November, 1975, and currently holds office by virtue of such election and pursuant to a Commission issued by the Governor of Pennsylvania on December 17, 1975, which

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1. By a stipulation of counsel dated April 16, 1979, it was agreed that certain of the facts set forth in these findings are true and correct. In most instances, these agreed findings have been adopted verbatim.

certified plaintiff Lagakos' right to hold said office from the first Monday of January, 1976.

6. Plaintiff Lagakos will attain his seventieth birthday on October 16, 1982.

7. Plaintiff, Joseph T. Murphy, is a Judge of the Court of Common Pleas of the First Judicial District of Pennsylvania composed of the County of Philadelphia. Plaintiff Murphy was appointed as a Judge of the Municipal Court of Philadelphia County on December 21, 1968. In November, 1969, plaintiff Murphy was elected as a Judge of the Municipal Court of Philadelphia County for a six-year term commencing in January, 1970. On December 31, 1971, plaintiff Murphy was appointed as Judge of the Court of Common Pleas. Plaintiff Murphy currently holds office by virtue of election in November, 1973, and pursuant to a Commission issued by the Governor of Pennsylvania on December 10, 1973, which certified plaintiff Murphy's right to hold said office from the first Monday of January, 1974.

8. Plaintiff Murphy will attain his seventieth birthday on October 21, 1980.

9. Plaintiff, James L. Stern, is a Judge of the Court of Common Pleas of the First Judicial District of Pennsylvania composed of the County of Philadelphia. Plaintiff Stern was appointed as a Judge of the County of Philadelphia in June, 1964, and elected, in November, 1965, for a ten-year term commencing in January, 1966. On January 1, 1969, by virtue of an amendment of the Pennsylvania Constitution, plaintiff Stern became a Judge of the Court of Common Pleas for a term to be completed in January 1976. Plaintiff Stern was retained in an election in November 1975, and currently holds office by virtue of such election and pursuant to a Commission issued by the Governor of Pennsylvania on December 17, 1975, which

certified his right to hold said office from the first Monday of January 1976.

10. Plaintiff Stern will attain his seventieth birthday on January 26, 1980.

11. Defendant Richard L. Thornburg is the Governor of the Commonwealth of Pennsylvania.

12. Defendant Ethel D. Allen is the Secretary of the Commonwealth of Pennsylvania.

13. Defendant Robert E. Casey is the Treasurer of the Commonwealth of Pennsylvania.

14. Defendant Alexander F. Barbieri is the Court Administrator of the Commonwealth of Pennsylvania.

15. Article V, Section 15 of the Pennsylvania Constitution (Adopted in 1968 to be effective January 1, 1969) provides for the tenure and election of judges and justices as follows:

> (a) The regular term of office of justices and judges shall be ten years and the regular term of office for judges of the municipal court and traffic court in the City of Philadelphia and of justices of the peace shall be six years. The tenure of any justice or judge shall not be affected by changes in judicial districts or by reduction in the number of judges.
>
> (b) A justice or judge elected under section thirteen (a), appointed under section thirteen (d) or retained under this section fifteen (b) may file a declaration of candidacy for retention election with the officer of the Commonwealth who under law shall have supervision over elections on or before the first Monday of January of the year in which his term of office expires. If no declaration is filed,

a vacancy shall exist upon the expiration of the term of office of such justice or judge, to be filled by election under section thirteen (a) or by appointment under section thirteen (d) if applicable. If a justice or judge files a declaration, his name shall be submitted to the electors without party designation, on a separate judicial ballot or in a separate column on voting machines, at the municipal election immediately preceding the expiration of the term of office of the justice or judge, to determine only the question whether he shall be retained in office. If a majority is against retention, a vacancy shall exist upon the expiration of his term of office, to be filled by appointment under section thirteen (b) or under section thirteen (d) if applicable. If a majority favors retention, the justice or judge shall serve for the regular term of office provided herein, unless sooner removed or retired. At the expiration of each term a justice or judge shall be eligible for retention as provided herein, subject only to the retirement provisions of his article.

16. Article V, Section 16(b) of the Pennsylvania Constitution (Adopted in 1968) to be effective January 1, 1969) provides:

(b) Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years. Former and retired justices, judges and justices of the peace shall receive such compensation as shall be provided by law. No compensation shall be paid to any justice, judge or justice of the peace who is suspended or removed from office under section eighteen of this article or under article six.

17. Defendant Thornburgh in accordance with Article V, Section 13(b) of the Pennsylvania Constitution nominates and, with the advice and consent of two-thirds of members elected to the Senate, appoints a justice or judge to fill vacancy in the office of justice or judge. Act of April 9, 1929, P.L. 177, No. 175 §207.1 as added to by Act of November 8, 1976, P.L. 1109, No. 227 §2, 71 P.S. §67.1. Any judicial office previously held by a judge or justice who has attained seventy years of age has been considered to be a vacancy to be filled pursuant to this gubernatorial appointment power.

18. Defendant Thornburgh issues a commission to each person elected as a judge or justice. Act of June 3, 1937, P.L. 1333, art. XIV, §1415, *as amended* Act of May 18, 1945, P.L. 694, No. 298, §1, 25 P.S. §3165. Defendant Thornburgh issues commissions to persons elected to judicial offices made vacant by a judge or justice who has attained seventy years of age.

19. Defendant Allen is responsible for sending to the county board of elections of each county in Pennsylvania a written notice designating all the offices, including judicial offices, for which candidates are to be nominated. Act of June 3, 1937, P.L. 1333, art. IX, §905 *as amended* Act of August 13, 1963, P.L. 707, §10, 25 P.S. §2865. Defendant Allen designates to be filled by election, any vacancy in a judicial office caused by a judge or justice who attains seventy years of age.

20. Defendant Allen is responsible for certifying to county boards of elections the laws of candidates for judicial office. Act of June 3, 1937, P.L. 1333, art. II, §201, 25 P.S. §2621. Defendant Allen certifies, as a judicial vacancy, the office of any judge or justice who has attained seventy years of age. Defendant Allen will not certify, for

inclusion on the ballot of a retention election, any judge or justice who has attained seven years of age.

21. Defendant Casey is responsible for the payment of all salaries established by law, including that of any judge or justice. Act of March 30, 1811, P.L. 145, 5 Sm.L. 228, §8, *as amended,* Act of July 18, 1974, P.L. 472, No. 168, §1, 72 P.S. §4521. Defendant Casey will not continue to pay a salary to any judge or justice who attains seventy years of age. Defendant Casey will, however, commence to dispense to any judge or justice who attains seventy years of age any funds to which such judge or justice may be entitled under the State Employees' Retirement Code, 71 Pa.C.S.A. §1501 *et seq.*

22. Defendant Barbieri is responsible for the maintenance of central records relating to the qualifications, employment status, basis of compensation and other personnel information of all personnel of the Pennsylvania judicial system compensated in whole or in part through funds appropriated to the judicial system pursuant to Rule 504 (10) of the Pennsylvania Rules of Judicial Administration. Defendant Barbieri authorizes the Treasurer of the Commonwealth to discontinue the salary of any judge or justice who attains seventy years of age, and thereby causes such judge or justice to be removed from the State Judicial payroll. Defendant Barbieri also certifies to the Governor and to the Secretary of the Commonwealth a vacancy in any judicial office held by a judge or justice who attains seventy years of age.

23. No non-judicial elected official in Pennsylvania is subject to a mandatory retirement age.

24. Section 8 of the Schedule to Article 5 of the Pennsylvania Constitution (Adopted in 1968 to be effective

January 1, 1969) the so-called "grandfather clause," provides that "[n]otwithstanding any provision in the article, a present justice, judge or justice of the peace may complete his term of office." The term "present" refers to the effective date of the provision.

25. Plaintiffs herein cannot avail themselves of the so-called "grandfather clause" to avoid retirement at age 70. Only those justices and judges elected prior to January 1, 1969, namely Chief Justice Eagen, Justice O'Brien and Justice Roberts of the Pennsylvania Supreme Court are subject to the so-called "grandfather clause."

26. Article V, Section 18 of the Pennsylvania Constitution (Adopted in 1968 to be effective January 1, 1969) provides for the creation of a Judicial Inquiry and Review Board. The Board considers grounds for suspension, removal, discipline, or compulsory retirement of a justice or judge for prohibited activities, including a violation of any legal or judicial canon, misconduct in office, neglect of duty, failure to perform his duties, conduct which prejudices the proper administration of justice or brings the judicial office into disrepute, or for disability seriously interfering with the performance of his duties. Pursuant to the above provision, the Pennsylvania Supreme Court Promulgated Rules of Procedure Governing the Judicial Inquiry and Review Board, a copy of which is marked Exhibit P-8.

27. Pursuant to the present provisions of Article V, Section 16(b) the Pennsylvania Constitution each of the plaintiffs would be retired from office on the following dates notwithstanding the fact that none of them will have completed the term of office for which he was elected:

Malmed	January 2, 1982
Kubacki	August 25, 1985
Lagakos	October 16, 1982
Murphy	October 21, 1980
Stern	January 26, 1980

28. If each of the plaintiffs is forced to retire upon the attainment of his seventieth birthday, defendant Thornburgh will declare a vacancy in that judge's office, will consider himself free to appoint a new judge to fill that vacancy, and will issue a commission to any person appointed and confirmed to fill that vacancy.

29. If each of the plaintiffs is forced to retire upon the attainment of his seventieth birthday, defendant Allen will notify the Board of Elections of Philadelphia County that the judge's office is vacant and is one for which candidates are to be nominated, and further defendant Allen will not certify for inclusion on the ballot for retention any of the plaintiffs after he has reached his seventieth birthday.

30. If each of the plaintiffs is forced to retire upon the attainment of his seventieth birthday, defendant Casey will not pay him a salary for full-time judicial service.

31. If each of the plaintiffs is forced to retire upon the attainment of his seventieth birthday, defendant Barbieri will cause said judge to be removed from the State Judicial payroll and will certify to the Governor and Secretary of the Commonwealth a vacancy in that judge's office.

32. Each of the plaintiffs is presently physically and mentally capable of performing and fulfilling his judicial duties.

33. Chief Justice Eagen, age 71, Justice O'Brien, age 75, and Justice Roberts, age 72, are all presently in active service on the Supreme Court of Pennsylvania under the grand-

father clause and will not be required to retire until the end of their respective terms. The term of office and active service of Chief Justice Eagen expires on the first Monday in January 1981, for Justice O'Brien in 1983 and Justice Roberts in 1984.

34. There are presently 54 senior judges in the Commonwealth of Pennsylvania, of whom 47 are 70 years of age or more. There are approximately 300 active judges in the Courts of Common Pleas, Commonwealth Court, Superior Court, and Supreme Court. See 1978 Report, Administrative Office of Pennsylvania Courts.

35. Between January 1, 1969, and the present, every judge who has reached the age of 70 while in office, and requested assignment to duties as a senior judge was accepted as a senior judge and served as a senior judge.

36. From 1968 to the present there has been and continues to be a shortage of judicial manpower in Pennsylvania.

37. Senior judges like active judges can be assigned duties in any county in the Commonwealth.

38. Judge Lipez of the Court of Common Pleas of Lycoming County who has been retired because of reaching the age of 70 has been assigned duties as a Senior Judge on the Superior Court of Pennsylvania, and the following Superior Court Judges who have been retired because of reaching the age of 70 have been assigned duties as senior judges on the Superior Court:

J. Sydney Hoffman, age 70.

Harry M. Montgomery, age 77.

Robert VanDerVoort, age 70.

G. Harold Watkins, age 76.

39. The method used for determining whether a judge who so desires may serve as a senior judge is set forth in Pennsylvania Rule of Judicial Administration 701.

40. Prior to the 1968 amendment to the Judiciary Article (Article V) of the Pennsylvania Constitution there was no compulsory retirement of judges in Pennsylvania.

41. Prior to 1965 there was no provision in the law of Pennsylvania for the service of former judges after their retirement.

42. On November 2, 1965, the Constitution of 1874 was amended by adding Section 18 to Article V thereof which provided:

> The Chief Justice of the Supreme Court may designate and assign former judges, learned in the law, who are willing so to do, who have served at least one term and who have not been defeated for re-election, to the office of judge of any court of record, to temporarily sit in the courts of any judicial district for the disposal of business under such circumstances and subject to such qualifications and conditions as the General Assembly may prescribe.

43. Pursuant to the provisions of Article V, Section 18 of the Pennsylvania Constitution as amended November 2, 1965, the Pennsylvania legislature passed the Act of August 31, 1966, P.L. 47 §§1 *et seq.*, 17 P.S. §§790.101 *et seq.* (Supp.) which provides that any former judge who has served at least one term and who has not been defeated for reelection may be assigned by the Chief Justice of the Supreme Court to sit temporarily as a judge in any judicial district. The president judge of any court of record may request the services of one or more former judges

when he deems it "necessary for the purpose of expediting the business of the said court." 17 P.S. §790.-104.

44. The Supreme Court of Pennsylvania adopted Supreme Court Rule 79, effective October 10, 1966, which provides as follows:

> Any former Judge learned in the law who has served at least one term and has not been defeated for reelection and who shall file with the Prothonotary of the Supreme Court, at any convenient time after the effective date of this Rule, a statement of the ensuing weeks or months during which he is willing to be assigned to sit in the Courts of any judicial district for the disposal of its business, and certifies that he is not engaged in the practice of law or in any activity incompatible with Judicial office and does not intend to engage in the practice of law in the future, may be designated and assigned by the Chief Justice of the Supreme Court to the office of Judge of any court of record to sit temporarily and as directed by the Chief Justice in the courts of any such judicial districts for the disposal of such business as may arise during the period of assignment, provided that no former Judge shall be assigned to any district while any Judge thereof is assigned to and presiding in another district under any of the provisions of any Act of Assembly.

45. Article V, Section 16(c) of the Pennsylvania Constitution (Adopted in 1968 to be effective January 1, 1969) provides:

> (c) A former or retired justice or judge may, with his consent, be assigned by the Supreme Court on temporary judicial service as may be prescribed by rule of the Supreme Court.

46. By Order of the Supreme Court dated March 15, 1972, Supreme Court Rule 79 was renumbered as Pennsylvania Rule of Judicial Administration 701.

47. The current annual salary for judges of the Courts of Common Pleas on active service is $45,000 per year.

48. Included in the benefits which judges of the courts of Common Pleas on active service enjoy are:

(a) Sick leave with pay.

(b) Paid Vacation.

(c) Pay regardless of whether the judge is in chambers or in court.

49. The current compensation for senior judges assigned to duties by the Court Administrator is $125 per court day for days actually worked. Therefore, no compensation is provided for days spent working in chambers.

50. Senior judges called back to perform duties receive no paid sick days or paid vacation.

51. Per diem payments to senior judges are not considered compensation under the State Employees retirement of 1974, and therefore, do not increase the pension of such judges.

52. The availability of funds to pay senior judges called back to perform duties is dependent on the appropriation of funds for that purpose by the legislature.

53. During the past several years the legislative appropriation for the payment of the per diem salary of senior judges called back for temporary service has not been large enough to pay the per diem salary for all the days of service of qualified and available senior judges whose

services were needed by the courts of Common Pleas and as a result many senior judges worked part of the time for no compensation at all.

54. During the course of their active service judges in Pennsylvania are required to make contributions to the pension fund pursuant to 71 Pa.C.S.A. §§5101 *et seq.* and an amount of money is deducted from each judge's monthly salary for that purpose.

55. During the course of their active service as judges deductions have been made from the monthly salary of the plaintiffs for contribution to the pension fund.

56. Contributions made by the judges, including the plaintiffs, appreciate at the rate of four percent interest per year compounded annually.

57. The money which is deducted from a judge's salary for contribution to the pension fund is considered income to that judge for federal income tax purposes and, therefore, he pays tax on that money in the year he earns it.

58. At the time that each of the plaintiffs reaches his seventieth birthday he will have total accumulated deductions from his salary in the pension fund as follows:

Judge Malmed	$ 57,054
Judge Stern	85,967
Judge Kubacki	106,292
Judge Lagakos	122,681

59. At the time that each of the plaintiffs reaches his seventieth birthday he will have acquired a vested interest in pension funds contributed by the Commonwealth, the present value of which will be as follows as of the seven-

tieth birthday of each plaintiff (calculated as of April 1979):

Judge Malmed	$ 96,568
Judge Stern	146,667
Judge Kubacki	127,894
Judge Lagakos	152,210

60. The amount of money contributed to the pension fund by the Commonwealth for the benefit of any judge increases with each additional year of credit service attributed to that judge.

61. Upon retirement each judge, including the plaintiffs, will be given various options with regard to receiving the pension funds to which he is entitled. These options include the right to withdraw in a lump sum an amount of money not to exceed his total accumulated personal contribution to the pension fund and to receive annuities in varying amounts for his life and/or the life of a designated beneficiary at his death. These options are explained in the documents marked as P-9, P-10, P-11, and P-12, the only variable for different judges being the amount of money which depends on the individual judge's years of credited service, the amount of his salary during his active service, his life expectancy at retirement, and the life expectancy of his beneficiary.

62. The monthly payment which a judge and/or his beneficiary will receive under any given annuity will be larger, the shorter the life expectancy of the judge and/or his beneficiary at the time of the judge's retirement.

63. The larger the amount that the judge receives from his pension during his lifetime, the less that his beneficiary will receive either in a lump sum or monthly payments after the judge's death.

64. Exhibit P-9 sets forth the pension benefits to which Judge Malmed will be entitled upon reaching age 70 under various options calculated as of April 1979.

65. Exhibit P-10 sets forth the pension benefits to which Judge Stern will be entitled upon reaching age 70 under various options calculated as of April 1979.

66. Exhibit P-11 sets forth the pension benefits to which Judge Kubacki will be entitled upon reaching age 70 under various options calculated as of April 1979.

67. Exhibit P-12 sets forth the pension benefits to which Judge Lagakos will be entitled upon reaching age 70 under various options calculated as of April 1979.

68. Judges under 70 on active service acquire additional retirement benefits with added service. On the other hand, judges over 70 who return to temporary judicial service not only do not acquire additional retirement benefits during the period of their post retirement service, pension payments received by them during such service actually diminish the pension estate available for beneficiaries after the judge's death.

Stipulation ¶¶52, 56-71.

69. The compensation of a judge over 70 who returns to temporary judicial service is limited by 42 Pa.C.S.A. §3154(c) to an amount which together with the payments he receives from the pension fund will not exceed $45,000.

70. The mere fact that a judge reaches the chronological age of 70 does not affect his ability to perform his judicial duties and the vast majority of judges reaching the age of 70 are capable of continuing to perform those duties. See testimony of Doctors Obrist and Gorson, and Exhibits P-1, P-2, P-3, and P-4.

71. Persons, such as judges, who achieve success in learned professions are likely to retain their mental abilities for considerably longer periods of time than the population at large.

72. Individual determinations of the ability of individual judges age 70 and over could effectively filter out those judges who because of physical or mental disabilities are unable properly to perform their judicial functions.

73. The service of senior judges called back to perform duties has been essential to the administration of the court system in Pennsylvania in general and the court system in Philadelphia in particular.

74. Judges under 70 on active service receive an annual salary of $48,000, which when weekend, holidays and vacations are considered amounts to $200 per work day. On the other hand, judges over 70 who return to temporary judicial service receive only $125 per work day, and if such judges worked five days a week for 52 weeks, they would at the most earn $32,500 per year.

Stipulation ¶¶48, 50. Exhibit P-6 at pp. 23-25.

75. Judges under 70 on active service receive their judicial salary regardless of whether they are performing duties in court or in chambers and regardless of whether they are attending a judicial conference. On the other hand, judges over 70 who return to temporary judicial service are paid only for days in court and, therefore, are not paid for chambers time or time spent at judicial conferences.

Stipulation ¶¶49(c), 50. Exhibit P-6 at pp. —. Testimony of President Judge Bradley.

76. Judges under 70 on active service receive their judicial salary for unlimited periods of time while they are

unable to work because of illness so long as it appears that they will at some future time be able to return to their judicial duties. On the other hand, judges over 70 who return to temporary judicial service do not receive even a single paid sick day.

Stipulation ¶¶49(a), 51. Testimony of President Judge Bradley.

77. Judges under 70 on active service receive paid vacation time. On the other hand, judges over 70 who return to temporary judicial service receive no paid vacation time.

Stipulation ¶¶49(b), 51. Testimony of President Judge Bradley.

DISCUSSION

Plaintiff's attack on the state's mandatory retirement system is double barrelled. They argue that the challenged provision violates both the due process and the equal protection clauses of the Fourteenth Amendment. I am in complete agreement with their position.

I. DUE PROCESS

Plaintiffs contend that the mandatory retirement provision of the Pennsylvania Constitution violates their right to due process because it creates an "irrebuttable presumption" of incompetence to perform judicial duties. No challenge is raised to the legitimacy of the state's interest in insuring a competent judiciary. On the contrary, plaintiffs maintain that rather than being automatically retired at 70, judges [2] should be given individual opportunities to demonstrate their continued competence and ability.

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2. The mandatory retirement rule applies to "[j]ustices, judges, and justices of the peace." My holding in this opinion, however, is limited to judges of the Court of Common Pleas, since the evidence before me concerned only that court.

In support of their position, plaintiffs rely heavily on the Supreme Court's holding in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 39 L.Ed.2d 52 (1974). There, the Court considered a constitutional challenge to school board rules requiring pregnant teachers to take unpaid leaves of absence several months before they were expected to give birth. The defendants offered two justifications for such a rule. First, the maternity leave requirement fostered "continuity of classroom instruction" since it provided a firm date when the teacher would leave her employment, thereby making it easier to hire a substitute. The Court summarily rejected this argument, since any firm date chosen by the teacher herself would serve the same purpose, provided that the school board was given advance notice. 414 U.S. at 641-42, 94 S. Ct. at 797; see *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973).

Secondly, the defendants contended that mandatory maternity leaves served "the necessity of keeping physically unfit teachers out of the classroom," thereby insuring the safety of both the teacher and the students. The Supreme Court acknowledged that the schoolroom safety was a perfectly legitimate state purpose, and there was no doubt that the mandatory leave rules served that purpose. 414 U.S. at 643-44, 94 S. Ct. at 798. This, however, was no answer to the due process challenge, since the rules in question "amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing." 414 U.S. at 644, 94 S. Ct. at 798. Notably lacking was any "individualized determination" of a particular teacher's ability to continue in her job. Rather, "the rules contain an irrebuttable presumption of physical incompetency," and the presumption applied even to persons who remained fully able to teach. 414 U.S. at 644, 94 S. Ct. at 798.

The Court went on to observe that while the medical evidence in the record conflicted on many points, it overwhelmingly supported the conclusion that the time at which any pregnant woman becomes unable to work "is very much an individual matter." 414 U.S. at 645, 94 S. Ct. at 799 (footnote omitted). Indeed, while some pregnant women would be unable to work beyond the arbitrary cutoff date established by the defendants, there plainly were many others who could continue for longer periods. Thus, said the Court, the presumption contained in the rules "is 'neither necessarily [nor] universally true,' and is violative of the Due Process Clause." 414 U.S. at 646, 94 St. Ct. at 799.[3]

In so holding, the Court recalled its earlier decisions in *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L.Ed.2d 63 (1973), and *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972). The *Vlandis* decision held unconstitutional as violative of due process a state law which created an irrebuttable presumption of nonresidence for the purpose of benefitting from reduced tuition rates at a state university. The Court declared that such a presumption "is forbidden by the Due Process Clause" when it is not necessarily true in every case, "and when the State has reasonable alternative means of making the crucial determination." 412 U.S. at 452, 93 S. Ct. at 2236. In similar fashion, the irrebuttable presumption that unwed fathers are not competent parents fell under a due process challenge in *Stanley*. There, the Court conceded *arguendo*

3. It is interesting to note that Justice Rehnquist's dissenting opinion in *LaFleur* anticipated the very case that now stands before me. The dissent, joined in by Chief Justice Burger, speaks of "the jeopardy in which the Court's opinion places longstanding statutes providing for mandatory retirement of government employees." *LaFleur, supra*, 414 U.S. at 659, 94 S. Ct. at 805 (Rehnquist, J., dissenting).

that the presumption in question could be accurately applied to *most* unmarried fathers. 405 U.S. at 654, 92 S. Ct. at 1214. Nevertheless, since it was not true that *all* the persons affected were in fact incompetent, "the Due Process Clause require a more individualized determination" *LaFleur, supra,* 414 U.S. at 645, 94 S. Ct. at 799.

The *LaFleur–Vlandis–Stanley* line of authority controls the present case. Here the state has created a presumption that all judges become incompetent to perform their judicial duties when they reach 70 years of age, and it therefore requires them to retire from the bench at that point in their lives. The rule applies regardless of the fact that the particular judge involved may be fully capable of continuing to carry out the duties of his or her judicial office.

[2] The principal justification advanced by the Commonwealth for this rule is "the removal of unfit judges from the bench by means of mandatory retirement at age seventy." Brief for Defendants at 4. This is an undeniably legitimate state purpose, and plaintiffs make no argument to the contrary. It could even be conceded, for the moment, that the rule furthers this purpose if we assume *arguendo* that at least *some* judges are no longer able to perform their duties when they reach age 70. The question before me now, however, "is whether the [rule sweeps] too broadly" in serving its admittedly legitimate purpose. *LaFleur, supra,* 414 U.S. at 644, 94 S. Ct. at 798. I hold that it does.

It is clear that the presumption we are concerned with is true in neither all nor even most cases. The evidence showed, not surprisingly, that the age at which a person's intellectual abilities and physical stamina are lost or diminished is a highly individual matter. Indeed, for the purpose of determining a point of reduced mental capacity, health is a far more critical factor than age. N.T. 44. This,

of course, will vary dramatically from one person to the next. It should be noted that the variable which the Supreme Court found fatal in *LaFleur, supra,* was only a matter of weeks, or at most, months. Here, by contrast, the variation could range over dozens or even scores of years.

Moreover, it is clear that the Commonwealth itself does not believe in the validity of its own presumption. As indicated in my findings of fact, while judges in Pennsylvania are forced to retire at 70, they are not forced to stop being judges. Rather, the state permits retired judges to serve as "senior judges" if they so desire and if they are considered competent. Senior judges might have little significance to this case if their services were merely incidental to the operation of the state's judicial system. Nothing, however, could be further from the truth. The fact is that the Commonwealth relies on the work of senior judges to such an extent that they have become vital to the continued functioning of the Pennsylvania court system.

Presently, there are 54 former or retired judges rendering service as senior judges in Pennsylvania. Of these, 47 are over 70 years of age. At the same time, there are approximately 300 active judges serving in the Courts of Common Pleas, Commonwealth Court, Superior Court, and Supreme Court. Thus, senior judges constitute roughly 15 percent of the total judicial work force. It is clear from the record that a shortage of judicial manpower has existed in the Commonwealth for some time. N.T. 91. Although it is still a problem, this shortage has been significantly alleviated by the work of senior judges.

The experience of Philadelphia County is illustrative. At the present time, Philadelphia has 80 active judges and eight senior judges in the Court of Common Pleas. N.T. 88. The senior judges maintain substantially the same level of productivity as active judges. N.T. 97. One senior judge

serves as supervising judge of the arbitration program in addition to performing all his regular judicial duties on a full-time basis. N.T. 93. Other senior judges work in each of the court's divisions and render services that would otherwise have to be performed by active judges.

It is clear that the work of the senior judges has had a visibly favorable impact on the efficient operation of the Court of Common Pleas. The court has experienced a significant reduction in backlog of cases which would not have been possible without the senior judges. N.T. 94. Moreover, because of the availability of senior judges, it is no longer necessary for the court in Philadelphia to request assistance from active judges in other districts. This had to be done regularly before the advent of the senior judge system. N.T. 108.

It is fair to conclude, therefore, that senior judges make an important contribution to the functioning of the Pennsylvania judicial system,[4] and it will be remembered that the vast majority of these judges are over 70 years old. I am also mindful of the telling fact that since the inception of the senior judge system, the request of every former and retired judge for assignment to senior judge duties has been granted.

The above discussion reveals clearly that the Commonwealth itself places little credence in the validity of the presumption created by its mandatory retirement rule. The

4. The evidence in the record concerning the duties and performance of senior judges dealt largely with Philadelphia County. The defendants, however, offered no credible evidence to show that the favorable effect of the senior judge system in Philadelphia was significantly different from other counties. On the contrary, from the evidence before me it is fair to conclude that senior judges have come to play an important role in the efficient functioning of the state court system as a whole.

fact is that there are great numbers of judges who are perfectly capable of continuing in their judicial office well beyond the age of 70 years.

[3] It may be that *some* judges are incapable of effectively performing their duties when they reach 70, and some may even lose their abilities substantially before that time. Nevertheless, it is wholly unnecessary to trample on the rights of all who reach a given age merely in order to weed out the few who are no longer fit. Such an approach violates due process, especially where, as here, "the State has reasonable alternative means of making the crucial determination." *Vlandis v. Kline, supra,* 412 U.S. at 452, 93 S. Ct. at 2236.

Reasonable alternative means exist in this case. Finding of Fact No. 26 refers to the creation of the Judicial Inquiry and Review Board, pursuant to Article V, Section 18 of the Pennsylvania Constitution. This board is empowered to conduct investigations concerning allegations that a judge is guilty of misconduct or neglect of duty, or that he suffers from a disability which impedes the performance of his judicial functions. Such an investigation may be initiated by the Board on its own, or it may be in response to a complaint filed by any person. Exhibit P-8 sets forth the rules which establish a detailed procedure for a formal hearing where it is warranted. Following such a hearing, the Board can make a recommendation that the judge involved be suspended, removed, disciplined, or compelled to retire. Final authority for taking such action rests with the Supreme Court.

It is clear, that a procedure for monitoring the competence of judges already exists in Pennsylvania. Indeed, it might fairly be argued that the Inquiry and Review Board, without change, is adequate to serve the state interest of keeping unfit judges off the bench. Certainly, modifica-

tions are available which could fill any void left by the removal of the mandatory retirement rule. For example, the state could require that all judges' work be reviewed at a certain age, or a review could take place periodically, without regard to age. It is not within my province to delineate the mechanics of such a system. The important point is that reasonable alternative means exist for controlling the quality of the state's judiciary without imposing an arbitrarily chosen age at which all must retire. At the very least, it is no more difficult to measure the competence of a judge than it is to determine whether a pregnant woman can control a classroom, or whether an unmarried man can raise a child. See *LaFleur; Stanley, supra.*

[4] In addition to the need for maintaining judicial competence, the state offers several lesser justifications for the mandatory retirement rule. First, the Commonwealth submits that the present system serves the purpose of "updating the judiciary by infusion of 'new blood' knowledgeable in modern trends in the law." The defendants have offered no evidence, however, to show that elderly judges are any less cognizant of modern legal trends than their younger counterparts. In fact, quite the opposite may be true. The record contains numerous references to the benefits which the judicial system derives from the wisdom and experience of former and retired judges who serve as senior judges. See, e.g., Statement of Chief Justice Eagen Relative to Amendment of Pa.R.J.A. 701(a), October 5, 1977; see also Exhibit P-6. Absent persuasive supporting evidence, an intrusion on constitutional rights cannot be justified by the proposition that new blood is better than old blood.

[5] The state further submits that the present system of mandatory retirement provides opportunities for elevation to the bench; avoids the difficulty of determining an individual judge's competence; and provides certain notice

of upcoming judicial vacancies. While each of these purposes may be arguably legitimate, they are all matters of mere administrative convenience. Each can be amply served by other measures which do not infringe on constitutionally protected rights. "[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." *LaFleur, supra,* 414 U.S. at 647, 94 S. Ct. at 799.

I am persuaded, therefore, that the irrebuttable presumption created by Pennsylvania's mandatory retirement rule violates the due process clause because it is untrue in most, if not all, cases, and because reasonable alternative means exist by which the state can accomplish the rule's intended purposes.

In addition to *LaFleur, Vlandis,* and *Stanley, supra,* there are other cases which support this conclusion. Most significant among these is *Gurmankin v. Costanzo,* 556 F.2d 184 (3d Cir. 1977). The *Gurmankin* plaintiff was a blind woman who was denied the right to take a teacher's examination. Following *LaFleur,* the Third Circuit found that due process had been violated by the irrebuttable presumption that blind persons are incompetent to teach sighted students. Here also, the constitutional challenge was not to the requirement that teachers be competent to teach, but only to the denial of an opportunity for plaintiff to demonstrate her competence. 556 F.2d at 187, and n.5.

Also persuasive is the recent decision of my learned colleague, Judge Cahn, in *Davis v. Bucher,* 451 F. Supp. 791 (E.D. Pa. 1978). There, the irrebuttable presumption that persons with a history of narcotics abuse were incompetent to engage in public employment was held violative of the due process clause. Once again, the Constitution was interpreted to require individual determinations of competence. In so holding, Judge Cahn noted that the plaintiffs

before him were only *applying* for work, thereby placing them in a somewhat less tenable position than the *LaFleur* plaintiffs, who sought to protect their rights to present employment. Mindful of this distinction, the court refrained from holding that the plaintiffs were entitled to a full hearing on all job qualifications. Nevertheless, "if the City establishes a policy which is as facially arbitrary as the one in the case at bar and seeks to apply it in a conclusive manner, then plaintiffs should, at a minimum, be given an opportunity to demonstrate that the policy is inappropriate in their case." 451 F. Supp. at 800.

Despite the clear teachings of these cases, however, the defendants contend that the analysis expressed at length above is not a proper ground for decision. They argue that however compelling the irrebuttable presumption doctrine may once have been, it is no longer applicable in this, or any other case.

To follow the course of defendants' reasoning, we must begin with the decision of the Court of Appeals for the Seventh Circuit in *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir. 1979), cert. denied, — U.S. —, 100 S. Ct. 219, 62 L.Ed. 2d 142 (1979). There, a due process challenge was raised to an Illinois statute requiring retirement of state court judges at age 70, thus presenting a controversy which is materially indistinguishable from the present case. Finding no constitutional violation, the Seventh Circuit rejected a due process argument which was grounded firmly on the irrebuttable presumption doctrine. Clearly, if I chose to follow it, the *Trafelet* opinion would be fatal to the cause of action in the present case. Nevertheless, for several reasons, I find the Seventh Circuit's decision to be unpersuasive.

In rejecting the irrebuttable presumption approach, the *Trafelet* court relied heavily on an earlier decision of the

Seventh Circuit, *Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977), *aff'd by an equally divided court*, 434 U.S. 356, 98 S. Ct. 786, 54 L.Ed.2d 603 (1978), where "we expressed our uncertainty concerning the scope and continuing force of the doctrine of irrebuttable presumptions." *Trafelet*, 594 F.2d at 629. Evidently, this "uncertainty" is based on the failure of the Supreme Court to rely upon or even mention the irrebuttable presumption doctrine in the recent decisions of *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L.Ed.2d 520 (1976), and *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L.Ed.2d 171 (1979). These decisions held, respectively, that the equal protection clause was not violated by mandatory retirement rules affecting state police officers and foreign service officials.

[6, 7] For reasons explained later in this opinion, I find that *Murgia* and *Vance* are wholly distinguishable from the equal protection claim now before me. As far as due process is concerned, the fact is that these cases simply do not address the issue.[5] The irrebuttable presumption analysis is a doctrine of constitutional law developed in a due process context. It has been endorsed and relied upon by the Supreme Court in at least three major decisions within the past seven years. See *LaFleur, Vlandis, Stanley, supra*. It is inconceivable to me that such a doctrine could be somehow negated or overruled by default simply be-

5. Plaintiffs have argued that the Supreme Court *could not* consider the irrebuttable presumption doctrine in *Murgia, supra*, because the issue was not raised. The question presented on appeal, however, simply asked the Court to decide: "Is Massachusetts statute mandating retirement of state police officer upon reaching age of 50 constitutional?" 43 U.S.L.W. 3504 (March 18, 1975). It appears therefore that the Court could have inquired into the due process aspects of the case if it so desired. Nevertheless, it is clear that the Court's opinion dealt only with equal protection principles, and I will not read it as extending beyond that realm.

cause the Supreme Court has not availed itself of several alleged opportunities to discuss it. From the language and analysis used in the majority opinions, it is clear to me that *Murgia* and *Vance* were decided strictly in an equal protection context.[6] They should not, therefore, be read as impliedly overruling a doctrine developed within the scope of due process.

Apparently, the *Trafelet* court was not concerned with the fact that the constitutional analysis in *Murgia* and *Vance* was limited to equal protection. The court relied here on the Second Circuit's opinion in *Palmer v. Ticcione*, 576 F.2d 459 (2d Cir. 1978), cert. denied, 440 U.S. 945, 99 St. Ct. 1421, 59 L.Ed.2d 633 (1979), which suggests the theory that the irrebuttable presumption doctrine, though born in the realm of due process, was later absorbed into equal protection law, where it died a silent death. Thus, it is said that "where 'the statute' classification is sustainable as rationally based, then it should not fall because it might also be labelled a presumption. *Trafelet, supra*, 594 F.2d at 630, quoting *Palmer, supra*, 576 F.2d 463. In my view, this approach ignores the clear command of *LaFleur, Vlandis*, and *Stanley*. In each of those cases, the

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6. "This case presents the question whether the provisions . . . that a uniformed state police officer 'shall be retired . . . upon his attaining age fifty,' denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment." *Murgia, supra*, 427 U.S. at 308, 96 S. Ct. at 2564. "We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws." *Id.*, at 317, 96 S. Ct. at 2564. "The issue presented is whether Congress violates the equal protection component of the Fifth Amendment's Due Process Clause. . . ." *Vance, supra*, 440 U.S. at 94, 99 S. Ct. at 942; "In an equal protection case of this type. . . ." *Id.*, at 111, 99 S. Ct. at 950.

The determinative consideration in both *Murgia* and *Vance* was the presence of a rational basis for the challenged rules. This factor, of course, is traditionally associated with equal protection analysis, rather than due process.

statutory classification involved might well have been "attainable as rationally based." In *LaFleur*, the Supreme Court stated plainly that the "mandatory termination . . . rule surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers." 414 U.S. at 644, 94 S. Ct. at 798. Similarly in *Stanley*, the Court was willing to concede *arguendo* that "most unmarried fathers are unsuitable and neglectful parents," thereby providing a clearly rational basis for the rule in question. Nevertheless, where the rules were not universally applicable, and where a reasonable alternative means existed for making the necessary determination, the statutory classification in each of those cases fell, precisely because it could be "labelled a presumption." [7]

[8] For these reasons, I reject the defendants' argument that the irrebuttable presumption doctrine is no longer viable. I think it highly improper to hold that a well-established doctrine of due process law has been overruled

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7. My conclusion that the presumption doctrine stands separate and apart from equal protection law is supported by *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977). There, the Court of Appeals affirmed the decision of a district court that the refusal to permit a blind person to sit for a teacher's examination violated due process because it impermissibly created an irrebuttable presumption. In so holding the court stated that because the due process analysis provided an adequate ground for deciding the case, "there is no reason for us to address Ms. Gurmankin's equal protection contentions. For the same reason we need not consider whether these contentions should . . . be rejected on the authority of *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L.Ed.2d 520 (1976) (per curiam)." 556 F.2d at 188. Thus, despite the views of the Second and Seventh Circuits, it is obvious that the Third Circuit recognizes a distinction between irrebuttable presumption analysis and equal protection law. Moreover, it may be inferred from *Gurmankin* that the Third Circuit does not read *Murgia, supra*, as weakening the validity of the irrebuttable presumption doctrine.

simply because the Supreme Court failed to mention it in opinions which speak only to the principles of equal protection.[8] Rather, I conclude that absent a clear expression to the contrary, the *LaFleur*, *Vlandis*, and *Stanley* opinions are still controlling. Therefore, I must apply the irrebuttable presumption doctrine when it is urged upon me in an appropriate case. The doctrine's appropriateness in this case is abundantly clear.

II. EQUAL PROTECTION

In Part I of this opinion, I have held that the Pennsylvania rule mandating the retirement of judges at 70 is unconstitutional because it violates the plaintiffs' right to due process of law. This holding is sufficient ground, by itself, upon which to decide this case and enjoin the enforcement

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8. Plainly, there is great danger in attaching undue significance to the Supreme Court's silence. In *Bellotti v. Baird*, — U.S. —, 99 S. Ct. 3035, 61 L.Ed.2d 797 (1979), decided only two months ago, the Court held that a state may not require a minor to obtain parental consent before getting an abortion, unless it also provides her with an alternative procedure whereby she may demonstrate her competence to make the necessary decision on her own, or that in any event the abortion is in her best interests. *Id.* at —, 99 S. Ct. at 3048. In so holding, the court does not cite or rely upon the irrebuttable presumption doctrine. Nevertheless, the *Bellotti* analysis is fully consistent with the doctrine's principles. Essentially, the statute conclusively presumed that minors are incapable of giving informed consent to an abortion. Noting that this is not always true, the Court required an alternative means whereby an individual minor could demonstrate her competence.

Would it be fair to assume that the Supreme Court has now overruled the irrebuttable presumption doctrine because, in effect, it has applied the doctrine's principles without actually citing the doctrine itself? Such a conclusion would be an absurd elevation of form over substance. Nevertheless, it is no more illogical than the argument, advanced by defendants, that the Supreme Court has overruled an aspect of due process law by confining itself to equal protection principles in a case that might also have been amenable to a due process analysis.

of Article V, Section 16(b). See *Gurmankin v. Costanzo, supra,* 556 F.2d at 188. Nevertheless, the parties have vigorously contested the equal protection aspects of the case, and it is appropriate to discuss these issues as well.

[9-11] At the outset, it is clear that the right allegedly infringed in this case, i.e., the right to public employment, is not a fundamental right. *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L.Ed.2d 491 (1970). Similarly, the plaintiffs do not qualify as a suspect class. See *San Antonio School District v. Rodriguez,* 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973). "Strict judicial scrutiny" is therefore inappropriate in this case, and the correct test for deciding the equal protection questions before me is the rational basis standard. *Massachusetts Board of Retirement v. Murgia, supra,* 427 U.S. at 312-14, 96 S. Ct. at 2566-67. In applying this test, I am mindful that "[t]his inquiry employs a relatively relaxed standard" and that "[p]erfection in making the necessary classification is neither possible nor necessary." Id. at 314, 96 S. Ct. at 2567. On the contrary, to survive the rational basis challenge, the rule need only be "rationally related to furthering a legitimate state interest." Id., at 312, 96 S. Ct. at 2566.

Defendants argue that the mandatory retirement of judges rule satisfies the above mentioned standard because it is rationally related to the purpose of keeping unfit judges off the bench. This is, of course, a perfectly legitimate state purpose. The question is whether the challenged rule bears a rational relationship to that purpose.

[12] It is clear that the concept of mandatory retirement at a specified age does not, by itself, violate equal protection. There are many decisions upholding mandatory retirement systems, and defendants rely on these to support their argument. This line of decisions is led by *Massachu-*

setts Board of Retirement v. Murgia, supra, and *Vance v. Bradley, supra.* In both cases, the Supreme Court upheld the mandatory retirement of certain public employees. Despite defendants' urgings, however, I find that these cases do not control the present controversy.

In *Murgia,* the Court considered an equal protection challenge to a Massachusetts law requiring uniformed state police officers to retire at age 50. The evidence showed that the physical demands of the job were considerable and that the risk of physical failure clearly increased with age. The district court in *Murgia* found that the rule violated equal protection because no basis had been shown for setting the cutoff at age 50. The Supreme Court reversed, since, however arbitrary a particular age might be, it was clear that a relationship had been shown between advancing age and a diminution of the physical abilities required to perform the officer's job. A rule that removed all at a fixed age, therefore, at the very least, had a rational basis. 427 U.S. at 315, 96 S. Ct. at 2568.

A very different set of facts emerges from the evidence in this case. Here, the record contains no proof of a relationship between advancing age and ability to perform the duties of a judge. On the contrary, the evidence before me belies the existence of any such relationship.

We are not concerned in this case with an occupation that requires sustained physical ability or stamina, such as that of a uniformed police officer. Rather, we are dealing with judges, a most unique and select class of individuals. The evidence before me showed that it is a serious mistake to consider the population as a whole when determining an age at which physical and mental abilities begin to deteriorate. On the contrary, the plaintiffs' expert testified, without contradiction, that persons, such as judges, who have advanced education and who have succeeded in

reaching the upper levels of their profession are likely to survive and retain their abilities for a substantially longer period of time than the population at large. N.T. 45-46. This, of course, is fully consistent with the fact that persons over age 70 are presently serving as senior judges in Pennsylvania, rendering significant service to the Commonwealth. It will be remembered, too, that, without exception, every judge over 70 who requested assignment was readily accepted by the state.

The point is that this record provides no support at all for a connection between advanced age and inability to perform the duties of a judge, thereby rendering this case wholly distinguishable from *Murgia*.

[13] I am aware that it would be erroneous to place an affirmative burden on the defendants to come forward with "empirical proof" of a decline in ability to perform judicial duties with advancing age. *Vance v. Bradley, supra,* 440 U.S. 110, 99 S. Ct. 950. Rather, it is plaintiffs' duty to "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id.* at 111, 99 S. Ct. at 950. In my view, plaintiffs have met this heavy burden.

My conclusion here is based on more than the evidence that those at the top of their professions do not of necessity lose their abilities as the years pass. More compelling is the state's own conduct, which indicates clearly that the "governmental decisionmaker" did not and does not believe in the existence of any relationship between advanced age and judicial incompetence.

We have already seen that the state has assigned senior judge duties to every judge who has asked for them. Moreover, we have seen that the senior judges carry heavy

workloads, and have become esesntial to the continued health of the Pennsylvania judicial system. What we have not examined until now is the method by which the senior judges are compensated. Findings of Fact 74 to 77 set forth the striking differences between the compensation of senior judges and that of their "active" colleagues.

Active judges receive an annual salary of $48,000. Senior judges are paid on a per diem basis. They receive $125 per day, which would amount at most to $32,500 per year. Active judges are paid regardless of whether they are on the bench, in their chambers, sick at home, or away on vacation. Senior judges, by contrast, are paid only for days worked, which is strictly limited to time spent on the bench. It does *not* include sick days or vacation periods of any kind. More surprisingly, it also does not include time spent in chambers writing opinions, conducting conferences, or tending to correspondence. While any trial judge knows that these are all necessary adjuncts of conducting trials, they are, nevertheless, not compensable labor for senior judges. Perhaps most remarkable of all is the fact that some senior judges actually render service without *any* compensation because the legislature limits the amount which can be spent for senior judge salaries each year. When this money is exhausted, senior judges work without pay.

While considering this system of compensation, it is to be kept in mind that the state has not as yet turned down an application for senior judge duties, and relies on senior judges as an essential part of its court system. It becomes readily apparent that this system is not in any way related to the removal of unfit judges from the bench. The fact is that the present system does not mandate retirement from the *bench* at all. Rather, it simply mandates retire-

ment from full salary. Removal from the bench has been for all practical purposes, a voluntary matter.

Neither *Murgia* nor *Vance* involved situations where employees were forced to retire, allegedly because they were too old to do their jobs, only to be allowed back into doing precisely what they had done before, albeit for a considerably reduced salary. In both of those cases, there was a clear basis for believing that employees would lose their ability to perform their jobs effectively as they reached advanced ages. Here, by contrast, the state's own conduct shows not only that no such basis exists, but also that the state never truly believed in its existence. The state encourages judges to work past 70, has never turned down a request for post-70 judicial duties, and even relies on the work of judges over 70 to keep its court system operating effectively. Nevertheless, it chooses to pay these judges at a significantly reduced rate, for no apparent reason other than age. In short, the mandatory retirement system is merely a thinly veiled scheme for acquiring cheap judicial labor. In practical application, the system bears no rational relationship to the state's purpose of removing unfit judges. I conclude, therefore, that this system violates plaintiffs' right to equal protection of the laws.

III. CONCLUSION

[14] For the reasons expressed at length above, I hold that the first sentence of Article V, Section 16(b) of the Pennsylvania Constitution insofar as it deals with Common Pleas judges is in conflict with the Constitution of the United States.[9] The enforcement of this provision as well

9. It is of no consequence that Article V, Section 16(b) is a provision of the state constitution rather than being a state statute. Even state constitutions must yield when they are in conflict with the Constitution of the United States. See *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964), reh. denied, 379 U.S. 870, 85 S. Ct. 12, 13 L.Ed.2d 76 (1965).

as all of its enabling statutes, must be permanently enjoined.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the parties and the subject matter of the present action. 28 U.S.C. §§1331, 1343(3) and (4). This is an appropriate action for declaratory relief. 28 U.S.C. §§2201-02.

2. The first sentence of Article V, Section 16(b) of the Pennsylvania Constitution violates the plaintiffs' right to due process of law under the Constitution of the United States because it creates an impermissible irrebuttable presumption.

3. This provision also violates the plaintiffs' right to equal protection of the laws under the Constitution of the United States because it is not rationally related to any legitimate state purpose.

4. Defendants must therefore be enjoined from enforcing the first sentence of Article V, Section 16(b) of the Pennsylvania Constitution as to any judge of the Court of Common Pleas.

ORDER

AND NOW, this 21st day of September, 1979, for the reasons expressed in the foregoing adjudication, the defendants are hereby enjoined from enforcing the first sentence of Article V, Section 16(b) of the Pennsylvania Constitution and all of its enabling statutes as to any judge of the Court of Common Pleas.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2467

(D. C. CIVIL No. 78-1418)

MALMED, EDWIN S., KUBACKI, STANLEY L., LAGAKOS, GREGORY G., MURPHY, JOSEPH T., STERN, JAMES L.,

vs.

THORNBURGH, RICHARD L., Individually and as Governor of Pennsylvania, ALLEN, ETHEL D., Individually and as Secretary of the Commonwealth of Pennsylvania, CASEY, ROBERT E., Individually and as Treasurer of the Commonwealth of Pennsylvania, and BARBIERI, ALEXANDER F., Individually and as Pennsylvania State Court Administrator,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, WEIS and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on April 21, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 21, 1979, be, and the same is hereby reversed and the cause is remanded to the district court with a direction to enter judgment in favor of the appellants. Costs taxed against appellees.

ATTEST:

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

Cost taxed in favor of appellants as follows:

Brief & Appendix	$107.64
Clerk's Fees	50.00
TOTAL	$157.64

May 13, 1980

Certified as a true copy and issued in lieu of a formal mandate on June 10, 1980.

Test: THOMAS F. QUINN
Clerk, United States Court of
Appeals for the Third Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2467

MALMED, EDWIN S., KUBACKI, STANLEY L., LAGAKOS, GREGORY G., MURPHY, JOSEPH T., STERN, JAMES L.

vs.

THORNBURGH, RICHARD L., Individually and as Governor of Pennsylvania, et al.,

Appellants.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

The mandate shall issue forthwith.

By the Court,

/s/ Joseph F. Weis, Jr.
JOSEPH F. WEIS, JR.
Judge

Dated: June 10, 1980

APPENDIX E

Pennsylvania Constitution, Article V, §18:

(a) There shall be a Judicial Inquiry and Review Board having nine members as follows: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.

* * *

(d) Under the procedure prescribed herein, any justice or judge may be suspended, removed from office or otherwise disciplined for violation of section seventeen of this article, misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute and may be retired for disability seriously interfering with the performance of his duties.

(e) The board shall keep informed as to matters relating to grounds for suspension, removal, discipline, or compulsory retirement of justices or judges. It shall receive complaints or reports, formal or informal, from any source pertaining to such matters, and shall make such preliminary investigations as it deems necessary.

* * *

(g) If, after hearing, the board finds good cause therefor, it shall recommend to the Supreme Court the suspension, removal, discipline or compulsory retirement of the justice or judge.

(h) The Supreme Court shall review the record of the board's proceedings on the law and facts and may

permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper. Upon an order for compulsory retirement, the justice or judge shall be retired with the same rights and privileges were he retired under section sixteen of this article. Upon an order for suspension or removal, the justice or judge shall be suspended or removed from office, and his salary shall cease from the date of such order. All papers filed with and proceedings before the board shall be confidential but upon being filed by the board in the Supreme Court, the record shall lose its confidential character. The filing of papers with and the giving of testimony before the board shall be privileged.

* * *

(k) The Supreme Court shall prescribe rules of procedure for the suspension, removal, discipline and compulsory retirement of justices of the peace.

APPENDIX F

42 Pa.C.S.A. §3154(c):

(c) Senior judges—The compensation of a senior judge assigned pursuant to section 4121 (relating to assignment of judges) shall be $125 per day. In any calendar year the amount of compensation which a senior judge shall be permitted to earn as a senior judge shall not, when added to retirement income paid by the Commonwealth to such senior judge, exceed the compensation payable by the Commonwealth to a judge then in regular active service on the court from which such senior judge retired.

APPENDIX G

Act of August 31, 1966, P.L. 47 §§1 *et seq.*, 17 P.S. §§790.101 *et seq*:

ASSIGNMENT OF FORMER JUDGES [NEW]

§780.101 Qualifications for temporary assignment.

Any former judge learned in the law of any court of record who is willing so to do, and who has served at least one term and has not been defeated for reelection, may be designated and assigned by the Chief Justice of the Supreme Court to the office of judge of any court of record to sit temporarily in the courts of any judicial districts for the disposal of business. 1966, Special Sess. No. 1, August 31, P.L. 47, §1.

§790.102 Filing of statement of availability

Any former judge learned in the law of any court or record who is willing so to do, and who has served at least one term and has not been defeated for reelection, shall file with the prothonotary of the Supreme Court, within thirty days from the approval of this act and at convenient times thereafter, a statement of the ensuing weeks or months during which he is willing to be assigned to sit in the courts of any judicial district for the disposal of business. 1968, Special Sess. No. 1, August 31. P.L. 47, §2.

§790.103 Former judges assignment docket

The prothonotary of the Supreme Court shall keep a separate docket, known as the "Former Judges Assignment Docket," in which he shall immediately record the name of each former judge who has filed a statement as provided in section 2 of this act, together with the district in which such former judge currently resides and

the periods that he has indicated in said statement. When any of the former judges shall be assigned, as hereafter provided in this act, the prothonotary shall forthwith enter upon his register the period or periods for which, and the district to which, they have been assigned. Upon receiving a request from any judge, asking information as to the former judges registered upon his docket, and the periods that each of said former judges has designated as the time during which he is willing to be assigned to sit in the courts of any judicial district, the prothonotary shall forthwith furnish such information in writing. 1966, Special Sess. No. 1, August 31, P.L. 47, §2.

§790.104 Procedure

The president judge of any court of record being of the opinion that it is necessary for the purpose of expediting the business of the said court, shall have the power to call upon any of said former judges so registered as aforesaid, by transmitting a written request to the Chief Justice of the Supreme Court, who shall forthwith send each request to the judge so called upon. If no particular former judge is designated in the call, then the Chief Justice shall transmit the request to any one of the former judges who is registered upon the docket indicating his willingness to serve during the period named in said call. The former judge who responds to any call under this section shall thereupon be assigned by the chief justice to preside specially in the district from which the call has come, for the purpose of transacting the business thereof, with the same power and authority as vested in the judge or judges of said district: Provided that no former judge shall be assigned to any district while any judge thereof is assigned to and presiding in another district under the provisions of any act of As-

sembly. 1966, Special Sess. No. 1, August 31, P.L. 47, §4.

§790.105 Monthly report by assigned judge

Each former judge so assigned, and presiding in said court of record as aforesaid, shall, at the end of the month in which he is so engaged, make and forward to the Auditor General, on a blank form to be furnished for that purpose, the piece or places where he presided as judge, the name of the court, the number of cases heard, and nature of the same, that is, criminal, civil or in equity, the number of days engaged, and an itemized list of official expenses incurred during such assignment. 1966, Special Sess. No. 1, August 31, P.L. 47, §5.

§790.106 Compensation

When any former judge, learned in the law, is assigned as provided by this act to assist the judge or judges of any judicial district, the former judge so assigned shall be entitled to receive, for each day he is actually engaged in the performance of such duty, the sum of seventy five dollars ($75) per day and the actual traveling expenses not in excess of ten cents ($.10) for each mile traveled to and from the place of holding court in such district. 1966, Special Sess. No. 1, August 31, P.L. 47, §6.

§790.107 Practice of law by judge

The practice of law on the part of any former judge serving under the provisions of this act shall be subject to the Canons of Judicial Ethics and such rules as may be proclaimed by the Supreme Court of Pennsylvania. 1966, Special Sess. No. 1, Aug. 31, P.L. 47, §7.

APPENDIX H

Pennsylvania Rule of Judicial Administration 701:

Assignment of Judges to Courts

(a) Certification of availability for assignment by former or retired judges. A former or retired judge who consents to accept assignment on temporary judicial service shall file with the Administrative Office a statement of the period during which he is willing to be assigned to a court, and a certification that he has not, since his last judicial duty, engaged in the practice of law or in any activity incompatible with judicial office and does not intend to engage in the practice of law in the future. In order to be qualified for assignment, such judge shall not have been defeated for re-election and shall have served as a judge (whether or not continuously or on the same court) by election or appointment for an aggregate of at least ten years, except that any duly elected justice or judge, having an aggregate of six years' judicial service, who is required to retire at age seventy, shall be eligible for assignment.

(b) Availability of other judges. An active judge desiring assignment on temporary judicial service to another court may file a statement with the Administrative Office similar to that provided in subdivision (a) of this rule, but the filing of such a statement shall not be a condition precedent to assignment on temporary judicial service under this rule.

(c) Judicial Assignment Register. The Administrative Office shall record the name of each judge filing statements under subdivisions (a) or (b) of this rule, and all other pertinent information relating thereto, in a book known as the Judicial Assignment Register.

(d) Request for the assignment of additional judges. Whenever the president judge of a court is of the opinion that the assignment of one or more judges to his court on temporary judicial service is necessary and proper for the prompt and proper disposition of the business of the court, he shall transmit a written request for judicial assistance to the Administrative Office.

(e) Recommendation by Administrative Office and Action by Chief Justice. The Court Administrator shall recommend to the Chief Justice, and the Chief Justice, when he deems it appropriate to do so may, by order, effectuate the assignment of any retired or former judge consenting thereto or any active judge to temporary judicial service on any court to fulfill a request made by the president judge thereof or when, by reason of case inventories or in the interest of justice, additional judicial assistance is required by any court.

(f) Duration of order of assignment. Unless otherwise provided in the order of assignment, the order shall continue in effect after its stated expiration date, if any, for such further time as may be required to complete unfinished business pending before the assigned judge on such date.

(g) Restrictions on temporary assignments. Except when required to take the place of a judge who is disqualified or has disqualified himself or is otherwise unavailable or under other appropriate circumstances, no judge shall be assigned under this rule to any court while any judge thereof is assigned to another court under this rule.

(h) Certification of service. The president judge of any court to which a judge has been temporarily assigned under this rule shall certify to the Administrative

Office, on a certificate completed and executed by the assigned judge, the number of days during which the assigned judge has performed temporary judicial service in such court and the amount of any compensation and expenses to which the assigned judge claims to be entitled by law.

(i) Expenses of Assigned Judges. Any judge assigned to duties outside of his judicial district may, in addition to any per diem payment now authorized by law, be reimbursed with the approval of the Court Administrator, his necessary expenses for hotel accommodations and meals incident to such duty, not in excess of seventy five dollars ($75) per day.

Note: The expense reimbursement authorized by subdivision (i) is in addition to the per diem payable under the Act of June 1, 1956 (1955 P.L. 1959) §10, 17 P.S. §830.32.

Adopted, effective Oct. 10, 1966; renumbered from Supreme Court Rule 79 by Order dated March 15, 1972; amended and effective Feb. 20, 1975; amended and effective June 10, 1975; amended and effective Oct. 5, 1977.

Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-361

In the Supreme Court of the United States

EDWIN S. MALMED, STANLEY L. KUBACKI, GREGORY G. LAGAKOS, JOSEPH T. MURPHY, and JAMES L. STERN,

Petitioners

v.

RICHARD L. THORNBURG, Individually and as Governor of Pennsylvania, ETHEL D. ALLEN, Individually and as Secretary of the Commonwealth of Pennsylvania, ROBERT E. CASEY, Individually and as Treasurer of the Commonwealth of Pennsylvania, and ALEXANDER F. BARBIERI, Individually and as Pennsylvania Court Administrator,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit at No. 79-2467.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the mandatory retirement of judges at age seventy serves any legitimate state purpose and, therefore, complies with the equal protection and due process clauses of the Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 80-361

EDWIN S. MALMED, STANLEY L. KUBACKI, GREGORY G. LAGAKOS, JOSEPH T. MURPHY, and JAMES L. STERN,

Petitioners

v.

RICHARD L. THORNBURGH, Individually and as Governor of Pennsylvania, ETHEL D. ALLEN, Individually and as Secretary of the Commonwealth of Pennsylvania, ROBERT E. CASEY, Individually and as Treasurer of the Commonwealth of Pennsylvania, and ALEXANDER F. BARBIERI, Individually and as Pennsylvania Court Administrator,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, Respondents submit this brief in opposition to Petitioner's Petition for a Writ of Certiorari.

I. COUNTER-STATEMENT OF THE CASE

A. Procedural History

This action was commenced by five judges of the Court of Common Pleas of Philadelphia County against the Governor, Secretary of the Commonwealth, Treasurer and Court Administrator of Pennsylvania seeking declaratory and equitable relief on the ground that Article V, Section 16 (b) of the Pennsylvania Constitution, providing for the mandatory retirement of judges at age 70, is unconstitutional in violation of the equal protection and due process clauses of the fourteenth amendment. No class action was filed by the plaintiffs or certified by the District Court.

The action was tried without a jury on April 17, 18 and 20, 1979. On September 21, 1979, the District Court handed down its opinion and order, *Malmed v. Thornburgh,* 478 F. Supp. 998 (E.D. Pa. 1979), holding that the mandatory retirement provision of Article V, §16 (b) conflicts with both the due process and equal protection clauses of the fourteenth amendment, declaring the provision null and void and enjoining enforcement of the provision and its enabling statutes "as to any judge of the Court of Common Pleas." 478 F. Supp. at 1016.

Defendants appealed to the Court of Appeals for the Third Circuit which, by opinion and order dated May 13,

1980, reversed the order of the District Court, holding that Article V, §16(b) does not violate the fourteenth amendment. Plaintiffs subsequently sought rehearing en banc, which was denied by order dated June 10, 1980.

Plaintiffs (hereinafter "petitioners") filed their petition for certiorari on September 3, 1980. This brief is filed on behalf of all respondents in opposition to that motion.

B. Statement of the Facts

In 1967, a special constitutional convention was convened to consider amendments to the Pennsylvania Constitution. As a result of the deliberations of that convention, a new Judiciary Article was adopted[1] on April 23, 1968. Included in that new Judiciary Article was Article V, §16(b), the provision at issue in this case, which provides in relevant part: "Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years."

This article was the product of extensive deliberations by the Judiciary Subcommittee of the Preparatory Committee for the Pennsylvania Constitutional Convention. In discussing the merits of the article, the Committee noted that "[a]bout one-half of the states require judges to retire at a fixed age, with seventy years being

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[1] The convention also recommended changes in other areas, most of which were adopted.

the most common."[2] The Judiciary Subcommittee went on to summarize the arguments favoring a mandatory retirement provision, stating that a mandatory retirement policy:

> substantially increases judicial manpower when a plan for part-time post-retirement service exists. By continually bringing in younger judges while retaining the part-time services of willing and able retired judges, a system of mandatory retirement plus post-retirement service helps solve the pressing problem of court congestion and delay. As mentioned previously, Pennsylvania already has provided for voluntary post-retirement service.
>
> eliminates unpleasantness of removing aged and disabled judges on an individual selective basis. Mandatory retirement is more impersonal than individual removal: everyone is treated alike. The difficulty and unpleasantness of determining which judges are senile and which are not is largely avoided.
>
> prevent[s] harm by few senile judges [which] more than offsets loss of judges who retain full powers past normal age. Besides, the services of able retired judges may be secured by a provision for post-retirement service.
>
> corresponds with current trend towards mandatory retirement in other public and private em-

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[2] Judiciary Subcommittee of the Preparatory Committee for the Pennsylvania Constitutional Convention, Reference Manual No. 5, at 202 (1968) (hereinafter "Reference Manual No. 5") (citing *Summaries of Judicial Salaries and Retirement Plans*, 49 J. Am. Jud. Socy. 168 (Feb. 1966)). This document was submitted by defendants and received as an exhibit at trial.

> ployments. There appears to be no good reason why judges should be treated differently from other public officials, teachers, executives, and other professional people who are subject to compulsory retirement.

Reference Manual No. 5, *supra* at 203-204. The Subcommitte also reported that the American Bar Association, the Pennsylvania Bar Association and National Municipal League had each advocated some form of mandatory retirement for judges.[3]

Based presumably[4] in large part on the discussion set forth in Reference Manual No. 5, the convention adopted the mandatory retirement language drafted by the Judiciary Subcommittee. Subsequently, when ratified by popular vote on April 23, 1968, that language became Article V, §16 of the Pennsylvania Constitution.

While Article V, §16(b) requires retirement of judges at age 70, Article V, §16(c) provides that "a former or retired justice or judge may, with his consent, be assigned by the Supreme Court on temporary judicial service as may be prescribed by rule of the Supreme Court" (39a). Under the implementing legislation, the compensation for judges assigned under §16(b) is $75.00 per day.[5]

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[3] Reference Manual No. 5, *supra* at 203.

[4] There was no debate and only little discussion of the mandatory retirement provisions during the considerations on the convention floor. See Debates of the Pennsylvania Constitutional Convention of 1967-68 (1968). See also *Malmed v. Thornburgh*, F.2d , n. 10 (3d Cir. 1980) (6a n. 10).

[5] The annual salary of active judges is $45,000. The maximum amount that a retired judge can earn is approximately $30,500.

According to the evidence, every judge who has reached the age of 70 while in office, and who has requested assignment to post-retirement service has been accepted and so served.[6] There was also testimony that many of those judges are as productive as active judges and that their work is essential to the effective operation of the judicial system in Pennsylvania. Finally, plaintiffs also presented evidence that physical health, and not age, is the most critical factor affecting the competence of professional persons, such as doctors, lawyers and judges.

At trial, petitioners contended, and the District Court held, that the primary purpose of §16(b) was the removal of unfit judges from the bench. While conceding that this is a legitimate state purpose, the District Court found that the provision for mandatory retirement at age seventy was overly broad, removing many judges who are fit to serve, and that, because less sweeping means were available to accomplish that end, Article V, §16(b) created an irrebuttable presumption violative of the due process clause of the fourteenth amendment. The trial court also held that the constitutional provision violated equal protection by allowing retired judges to continue to render the same services as active judges while paying them less money to do so.

On appeal, the Court of Appeals rejected the District Court's holding that the primary purpose of mandatory re-

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[6] This fact was stipulated by the parties. After filing their appeal, respondents sought a remand in order to file a motion for a new trial based in part on the allegation that that stipulation was inaccurate. The Court of Appeals denied the request to remand the case.

tirement was to remove unfit judges. Rather, focusing on the history of the Constitutional Convention, specifically the reports of the Judiciary Subcommittee of the Preparatory Committee,[7] the Court of Appeals found that the provision was intended to further and did, in fact, further four separate and legitimate state purposes, including the reduction of court congestion, the elimination of the unpleasantness of selectively removing aged and disabled judges, the prevention of harm by senile judges and conformity with the general trend toward mandatory retirement at seventy in other public and private employment. Accordingly, the Court of Appeals rejected the District Court's equal protection analysis.

The Court of Appeals found that same error fatal to the lower court's due process analysis. First, the Court rejected the trial court's use of the "less restrictive alternative" test, holding instead, that there need only be a raional basis for the state's classification. The court then reaffirmed the rational relationship between mandatory retirement and the four purposes set out in Reference Report No. 5.

Having rejected both bases for the District Court's holding, the Court of Appeals found the constitutional mandatory retirement provision to be constitutional. Accordingly, the court reversed the orders of the trial court.

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[7] Reference Manual No. 5, *supra*. See p. 4 *supra*.

II. REASONS FOR DENYING THE WRIT

A. The Courts of Appeals Which Have Considered the Question Are in Agreement That the Mandatory Retirement of Judges at Age Seventy Is Constitutional

Petitioners concede that the only other Court of Appeals which has considered the question has, like the Third Circuit, held that the mandatory retirement of judges at age seventy violates neither the equal protection nor the due process clauses of the fourteenth amendment. *Trafalet v. Thompson,* 594 F.2d 623 (7th Cir.), *cert. denied,* U.S. , 100 S.Ct. 219 (1979). Moreover, petitioners apparently pose no challenge to the holding of that court. Rather, they contend that *Trafalet* is distinguishable because in that case there was no evidence that a substantial number of retired judges continued to perform judicial functions or that retired judges received lower salaries for rendering services identical to those performed by younger judges.

By this contention, petitioners misconstrue the thrust of their own claim. Petitioners do not challenge the constitutional provision allowing the assignment of retired judges. Nor did they challenge the statute which implements that provision by providing compensation for those retired judges choosing to accept such assignment. Rather, they seek only to enjoin the separate constitutional section §16(b) which provides for mandatory retirement. Thus,

according to petitioners, it is rational to mandate retirement in one state and one Circuit, but not in another. This result is obviously unacceptable.

Rather, as the Third Circuit properly recognized, the sole question before a federal court reviewing a state constitutional provision under the equal protection (15a) and due process clauses (24a) is whether that provision is rationally related to the accomplishment of *any* legitimate state objective. Obviously, if mandatory retirement is rationally related to legitimate state objectives in one state, it is also related to those objectives in another. Accordingly, petitioners' attempt to distinguish the holding of the Seventh Circuit in *Trafalet* from that in this case is without merit. There is, therefore, agreement between the Circuits on the issue raised in this case and no need for this Court to review this case.

B. The Court of Appeals Properly Applied the Irrebuttable Presumption Doctrine to the Facts of This Case

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Petitioners contend that the Court of Appeals erred in failing to follow this Court's holding in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). According to petitioners, that case sets forth a test requiring that a statutory classification be both rational and the least restrictive means of accomplishing a proper state purpose.

In refusing to apply that test, the Court of Appeals apparently recognized, as has this Court, that an extension of the *LaFleur* holding would turn the irrebuttable pre-

sumption doctrine into "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." *Weinberger v. Salfi,* 422 U.S. 749, 772 (1975).

Thus, because no suspect class or fundamental interest is implicated in this case, the Court of Appeals properly applied the "rational relationship test" (21a-23a). See *Weinberger v. Salfi, supra* at 777. To do otherwise would have had the effect of elevating age to the category of "suspect classifications",[8] an analysis this Court has repeatedly rejected. *Vance v. Bradley,* 440 U.S. 93 (1979); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976) (per curiam).

Having determined that the mandatory retirement of judges at age seventy need only serve a rational state interest, the Court of Appeals then found that, in fact, four such interests were served. See pp. 6-7 *supra.*

Accordingly, the Court of Appeals properly applied the holdings of this Court and its holding need not be reviewed.

C. The Court of Appeals Correctly Held That Mandatory Retirement Furthers Legitimate State Aims and Is, Therefore, Constitutional

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In holding that the primary purpose of Article V, §16(b) is to remove unfit judges and that, in fact, man-

---

[8] As the Court of Appeals noted application of the *LaFleur* test to classifications based on age would place a wide range of state legislation in question (23a).

datory retirement "is merely a thinly veiled scheme for acquiring cheap judicial labor" (63a), the District Court committed two basic errors, both of which were properly rectified by the Court of Appeals. First, the District Court totally ignored the legislative history of the constitutional provision at issue and the express statements of purpose contained therein. As is noted above, the Court of Appeals read that history and correctly found four separate state interests supporting mandatory retirement,[9] each of which is rational and sufficiently furthered by the constitutional provision.

As importantly, in describing Pennsylvania's mandatory retirement system as a "thinly veiled scheme for acquiring cheap judicial labor" (63a), and relying on that finding to hold the entire system unconstitutional, the District Court improperly misinterpreted petitioners' claim. The acquisition of "cheap judicial labor" is neither a purpose nor an effect of the constitutional provision for mandatory retirement, Article V, §16(b), which petitioners challenge in this case. Nor is that the purpose or effect of the provision allowing the assignment of retired judges, Article V, §16(c). Rather, the lower rates of compensation for senior judges results directly and solely from implementing legislation. 42 Pa. C.S.A. §3154(c) (70a). Nothing in the challenged constitutional provision requires

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[9] (13a-14a). Specifically, the Court of Appeals found that mandatory retirement furthered the state's interest in reducing court congestion, the elimination of the unpleasantness of selectively removing aged and disabled judges, the prevention of harm by senile judges and conformity with the general trend mandatory retirement in other public and private employment. See Reference Manual No. 5, supra at 203.

or even suggests that result. Thus, while the district court might have stricken that implementing legislation as "a thinly veiled scheme for acquiring cheap judicial labor,"[10] 478 F. Supp. at 1015, that legislation provides no basis for the relief requested by petitioners, both here and in the lower courts—an injunction against their mandatory retirement. Accordingly, the Court of Appeals was correct in holding that this analysis was irrelevant to the constitutionality of mandatory retirement.

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[10] As the Court of Appeals properly noted, petitioners did not raise this issue in the District Court, but if they had there is no doubt that the difference in pay was rationally based. F.2d at n. 14 (15a n. 15).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitioner has presented no issues worthy of discretionary review by this Court and that, therefore, his Petition should be denied.

Respectfully submitted,

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OCTOBER TERM, 1980

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Respondents.

PETITIONERS' REPLY MEMORANDUM

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IN THE

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Respondents.

PETITIONERS' REPLY MEMORANDUM

Pursuant to *Rule* 22.4 of the Rules of the Supreme Court of the United States, Petitioners respectfully submit this memorandum in reply to Respondents' Brief in Opposition to Petition for a *Writ of Certiorari.*

RESTATEMENT OF THE CASE

Petitioners herein adopt the Statement of the Case set forth at pages 4 through 8 of their Petition for *Writ of Certiorari* filed on September 5, 1980, the pertinent facts of which Respondents have not disputed in their Brief in Opposition.

REPLY TO OPPOSING ARGUMENTS

A. *There exists no agreement between circuits regarding the questions here presented which questions have never been considered or decided by any other court*

Petitioners in this case do not attack mandatory retirement *per se* since no system of mandatory retirement of Pennsylvania judges, in effect, exists. Petitioners attack the system in Pennsylvania which, as evidenced by the stipulated and uncontradicted facts in the record, has since its implementation eliminated no judges but on the contrary has utilized the vast experience of judges reaching 70, while paying those judges substantially less than is paid to judges under 70 for the same work. See Petition, pages 12-14. This was made exceedingly clear to both the Court of Appeals and the trial court.

Because Respondents find it difficult to justify the system of "mandatory retirement" coupled with post retirement service as it exists in Pennsylvania, they create a "strawman" by suggesting that Petitioners' challenge, and the District Court's holding, are limited to the concept of mandatory retirement *per se*. Respondents then cite *Trafalet v. Thompson*, 594 F.2d 623 (7th Cir. 1979), *cert. denied*, — U.S. —, 100 S. Ct. 219, 62 L.Ed.2d 142 (1979) for the proposition that the only other Court of Appeals to have faced the issue, did, consistent with the Third Circuit decision in this case, rule that mandatory retirement *per se* does not violate the Fourteenth Amendment. Respondents conclude that such an agreement between the Circuits precludes any need for review by this Court.

Respondents have obviously missed the point. Neither *Trafalet*, distinguishable in that the state statute there

involved made specific provision for any judge performing post retirement service to receive the same compensation applicable to "non-retired" judges,[1] nor any other case has addressed or decided the actual issue here presented to this Court. Nor, for that matter, did the Court of Appeals below squarely confront the issue raised by Petitioners, which is, in itself, an appropriate reason to invoke this court's review. See Petition, pp. 12-14. Moreover, even if the issue presented in this case *were* to be limited to that decided in *Trafalet*, the mere fact of consistent decisions by two circuits would not alone obviate the need for review by this Court.

B. ***Petitioners have properly challenged not only Article V, Section 16(b), but all related constitutional provisions, legislation and regulations establishing and implementing the system of service by "Senior Judges" in Pennsylvania and have properly raised the unequal pay issue before the trial court***

Respondents argument, largely technical, that Petitioners did not challenge the constitutionality of the "unequal pay" and other relevant provisions is nevertheless inaccurate and incorrect.

Petitioners instituted this action by the filing of a Complaint for Declaratory Judgment, Injunctive and Other Equitable Relief citing *inter alia*, certain provisions concerning mandatory retirement, as well as the assignment and compensation of former judges, and requesting, *inter alia*, a declaration of the invalidity of mandatory retirement, and "such other relief as may be just and equitable." At trial, through their counsel's opening statement, and

1. See Petition for *Writ of Certiorari*, footnotes 6 at pages 14-15.

through the presentation of both live testimony and stipulated uncontradicted facts, Petitioners pursued a clear challenge to the Pennsylvania system of mandatory retirement, within the context of the present facts (See A, *supra*), taking issue with not only Article V, Section 16(b), but additionally, and in conjunction therewith, with any and all constitutional, statutory and regulatory provisions establishing and implementing the discriminatory system (37a-45a, 49a-50a; See A, *supra*). It is clear that the District Court, cognizant of the scope of Petitioners' challenge, and privy to the evidence presented in support thereof, premised its decision upon the unconstitutionality of not Article V, Section 16(b) alone, but upon the combined effect of what it perceived as a unified scheme 49a-50a; 62a-64a). The Court of Appeals then committed a basic error in its disregard of the record relating to the scheme. See Petition, pp. 12-14. Moreover, Respondents who have not questioned the scope of Petitioners' challenge all along should not be permitted to do so now.

C. Weinberger v. Salfi, *422 U.S. 749, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975) is not applicable to the facts of this case*

Weinberger v. Salfi, 422 U.S. 749, 95 S. Ct. 2457, 95 L.Ed.2d 522 (1974) does not, as Respondents contend, signal the demise of the irrebuttable presumption doctrine adopted by this court in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 31 L.Ed.2d 52 (1974), nor does it, as the Court of Appeals seems to have held, effectively reduce the doctrine to an equal protection rational relationship type of analysis. As noted in the Petition for *Writ of Certiorari*, at footnote 8, p. 18, *Salfi* merely deemed the *LaFleur* holding inapplicable to a narrow category of government benefits cases where the

plaintiffs enjoyed neither contractual nor constitutionally protected status (422 U.S. at 721-22, 95 S. Ct. at 2470) and where there was insufficient evidence that alternative means existed which could just as effectively satisfy the legislative purpose (422 U.S. at 782-83, 95 S. Ct. at 2475).

Following *LaFleur* in post-*Salfi* decisions such as *Turner v. Department of Employment Security*, 423 U.S. 44, 96 S. Ct. 249, 44 L.Ed.2d 181 (1975), and citing it with approval in others, *e.g.*, *Monell v. Department of Social Service of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), this Court has made it clear that lower courts should continue to apply the irrebuttable presumption doctrine to cases, like here, where the factual circumstances presented are virtually identical to those in *LaFleur*. Petitioners thus reiterate their argument, set forth at pages 15-20 of the Petition, that the Court of Appeals has, with respect to their Due Process challenge, erred.

D. *The District Court did properly analyze the legislative history of Article V, Section 16(b) and did render a proper decision accordingly*

Contrary to Respondent's assertion in this regard, the District Court did not ignore the legislative history of the constitutional provision in determining the Pennsylvania system of mandatory retirement to be "a thinly veiled system for acquiring cheap judicial labor" (63a). To the extent that any of those "state purposes" gleaned by the Court of Appeals from the Reference Manual were arguably relevant, the District Court did properly confront and adequately dispose of such purposes (52a-53a; Petition, pages 20-22). The Court of Appeals then erred in

sidestepping the record to substitute its own analysis as to the purpose of Article V, Section 16(b) even though the District Court's correct determination in that respect was amply supported by the records of the constitutional convention, and was based in part upon that position which Respondents themselves presented and then continuously adhered to throughout this litigation, that the primary purpose of mandatory retirement was to remove unfit judges. See Petition, pages 20-22.

CONCLUSION

For the reasons set forth in the Petition for *Writ of Certiorari*, and for the reasons set forth herein, it is respectfully submitted that a *Writ of Certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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